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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY HOSPITAL OF BELLAIRE,
Petitioner,

v.

NANCY DELGUZZO, EXECUTRIX, ETC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

GERALD P. DUFF
(Counsel of Record)
HANLON, DUFF & PALEUDIS
CO., LPA
46770 National Road West
St. Clairsville, Ohio 43950
Telephone: (614) 695-1444
Counsel for the Petitioner
The City Hospital of Bellaire

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THE QUESTIONS PRESENTED

Whether the strict application of a state notice of appeal rule, where the Appellant has provided notice to both the State Court and the opposing party that it has instituted the appeal, and where for some unknown reason the notice of appeal has not been timely docketed, results in an unconstitutional deprivation of due process and equal protection of law?

PARTIES TO THE PROCEEDINGS

This case involves important constitutional issues of due process and equal protection of law and the right to a jury trial, and adjudication of cases on their merits rather than upon procedural niceties and technicalities under State procedural rules. The Petitioner is the City Hospital of Bellaire, 4697 Harrison Street, Bellaire, Ohio. The Petitioner is a nonprofit private corporation incorporated under the laws of the State of Ohio. The Respondent is one Nancy DelGuzzo. She is the Executrix of the Estate of her late husband Ettor DelGuzzo, Dell Knoll Drive, Bellaire, Ohio, 43906.

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No. ———

THE CITY HOSPITAL OF BELLAIRE,
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v.

NANCY DELGUZZO, EXECUTRIX, ETC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The City Hospital of Beliaire respectfully petitions for a Writ of Certiorari to review the order of the Supreme Court of Ohio refusing to certify the record and dismissing Petitioner's appeal, entered in this proceeding on January 22, 1986. The effect of this order is to uphold the Court of Appeal's dismissal of Petitioner's appeal.

OPINIONS BELOW

This case involves alleged medical malpractice. Under the applicable Ohio statutes, medical malpractice cases are first heard by an arbitration panel. Ohio Revised Code § 2711.21. (App. 80a) Either party may refuse to accept the arbitration decision and thereby receive a trial in the Common Pleas Court of the county in which the litigation is pending. A jury trial had been demanded in the pleadings. The action herein was arbitrated. An

award of $675,000 was made in favor of Respondent by a majority of two arbitrators. (App. 18a) A dissenting opinion was filed. (App. 25a)

Following the arbitration decision in this matter, a hearing was held in the Court of Common Pleas, Belmont County, Ohio. The trial judge denied Petitioner its right to a jury trial. The journal entry order is dated August 12, 1985. (App. 7a) His decision is at App. 8a. The Court of Appeals of Belmont County, Ohio, Seventh Appellate District, both *sua sponte* and summarily without hearing or oral argument, dismissed the Notice of Appeal as untimely filed. The Court of Appeals' decision in this case is not reported. A copy is in the Appendix at page 4a. Two of the three Appeals Court Judges, while concurring in the dismissal, indicated the unfairness and unjustice of the proceedings. (App. 6a)

The Supreme Court of Ohio by a 4 to 3 margin refused to certify the record and affirmed without opinion. Again, no hearing was held. A copy of the Supreme Court of Ohio's announcement of the dismissal appears at App. 3a.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The dismissal of the Supreme Court of Ohio was entered on January 22, 1986. This Petition for Certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 2101 and 1257(3), and the Fourteenth Amendment to the Constitution of the United States.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in the Appendix:

1. The Constitution of the United States, Seventh Amendment, App. 69a.

2. The Constitution of the United States, Fourteenth Amendment, App. 67a.

3. Ohio Revised Code § 2711.21. (App. 80a)

4. Ohio Rule of Civil Procedure 38 (App. 70a)

5. Ohio Rule of Appellate Procedure 3(C). (App. 73a)

6. Ohio Rule of Appellate Procedure 4. (App. 72a)

7. Federal Rule of Appellate Procedure 4. (App. 74a)

STATEMENT OF THE CASE

The Complaint was filed on June 19, 1980, in the Court of Common Pleas, Belmont County, Ohio, and is entitled *Nancy DelGuzzo Executrix etc.* vs. *Dr. Joseph L. Williams, et al.*, Case No. 80-CIV-134. A jury trial was demanded. The Complaint alleged that as a proximate result of the Defendant doctors' negligence, the Respondent's decedent came to his premature death on November 18, 1979. Petitioner herein was later added as a defendant by amendment. A jury trial was again demanded. (App. 62a) Petitioner filed an Answer, wherein it denied any liability. (App. 59a) All Defendants except The City Hospital subsequently entered into covenants-not-to-sue.

In 1984, the arbitration hearing was held. The arbitration panel majority of two filed its report. (App. 18a) The third arbitrator filed a dissenting opinion on August 3, 1984. (App. 25a) On October 31, 1984, within the time limits prescribed by the Ohio Arbitration Statutes, the Petitioner, The City Hospital, filed a Motion to Modify the Arbitration Award. (App. 57a) It requested that the arbitrator's award be modified by deducting the value of the covenants-not-to-sue which were entered into between the Respondent and the other Defendants.

On February 5, 1985, a hearing was held in the Court of Common Pleas, Belmont County, Ohio. On March 22,

1985, the Trial Court entered judgment in favor of the Respondent, against the Petitioner The City Hospital. (App. 11a) In so doing, the Trial Court overruled the Motion of the Petitioner to modify the award of the arbitrators. The Trial Court also sustained the motion of Respondent to confirm the award of the arbitrators.

On April 1, 1985, the Petitioner gave notice that it rejected the arbitrator's award as determined by the Court in its decision of March 22, 1985. (App. 55a) It further moved the Trial Court for an order to amend the pleadings in accordance with § 2711.21 of the Ohio Revised Code and for a trial date at which time the issues in this case may be decided by a jury.

On April 18, 1985, Petitioner filed a motion to vacate based upon the inherent common law power of the Court, or alternatively Rule 60(B) of the Ohio Rules of Civil Procedure. (App. 53a) Petitioner asserted that the Trial Court had no power to award and journalize a judgment under the proceedings set forth in § 2711.21, of the Ohio Revised Code.

On August 12, 1985, the Trial Court overruled the Petitioner's Motion to Vacate and the Motion to Amend the Pleadings and for a trial date. (App. 7a) The City Hospital's counsel, on August 30, 1985, prepared a Notice of Appeal for filing. An affidavit attesting to this was filed. (App 51a) The original Notice plus copies, were placed in an envelope addressed to the Clerk of Courts, Belmont County Courthouse, St. Clairsville, Ohio, 43950. The envelope was mailed by first class mail, postage prepaid, and was placed in the United States Mail service on the afternoon of August 30, 1985. (App. 51a) Copies of the Notice of Appeal were also mailed that same day to Respondent's counsel, Richard L. Lancione in Bellaire, Ohio, and John G. Lancione, in Cleveland, Ohio. (App. 51a) *It is acknowledged* by Affidavits that the copies of the Notice of Appeal were received by each attorney for Respondent. (App. 43a and 44a)

On September 5, 1985, Petitioner's attorney forwarded a request for the transcript to the Court Reporter for Belmont County, Ohio, a copy of which was time-stamped by the Clerk September 6, 1985, and returned to Petitioner's counsel on September 13, 1985. (App. 45a) This filing was well within the 30 day appeal rule.

On Monday, September 23, 1985, counsel for Petitioner was notified by Attorney John G. Lancione that the Clerk of Courts did not docket the Notice of Appeal. Upon inquiry, the Clerk stated he did not receive a copy of the Notice of Appeal. (App. 51a) The Notice of Appeal and accompanying letter were not returned by the United States Postal Service to Petitioner's counsel. (App. 51a)

Therefore, on September 26, 1985, counsel for Petitioner mailed by first class mail, postage pre-paid, a Second Notice of Appeal, addressed to the Clerk of Courts, Belmont County Common Pleas Court, Belmont County Courthouse, St. Clairsville, Ohio, 43950. This Notice of Appeal was received and was filed on September 30, 1985. (App. 41a)

On October 23, 1985, the three member Court of Appeals of Belmont County, Ohio, Seventh Appellate District, *sua sponte* and summarily dismissed the Notice of Appeal filed on September 30, 1985, as untimely filed. (App. 4a) Appeals Court Judge Edward A. Cox, however, issued a separate opinion and stated:

> "I feel that under the facts of this case, in which all parties agree that the Notice of Appeal was mailed well within rule, and for some unknown reason was never received by the Clerk's Office, that the Appeal, in all fairness, should not be dismissed. . . .
>
> I find the enforcement of Ohio Rules of Appellate Procedure 4(A), under this statement of facts, to be patently unfair, and I signed the Entry of Dismissal only because I find that I have no authority to do otherwise."

Appeals Court Judge Joseph Donofrio concurred in this opinion. (App. 6a)

Due Notice of Appeal along with accompanying Memorandum in Support of Jurisdiction was filed in the Ohio Supreme Court on November 21, 1985. In its Memorandum in Support of Jurisdiction Petitioner asserted three Propositions of Law, including state law grounds and the constitutional grounds asserted here. (App. 34a, 38a) On January 22, 1986, the Supreme Court of Ohio refused to order the record certified and summarily dismissed the appeal. (App. 1a)

The City Hospital of Bellaire has never had one day in Court on the merits of this case and yet has a $675,000 judgment entered against it! It has been deprived of its right to a jury trial in the Common Pleas Court. It has been refused its appeal to the Ohio Court of Appeals, and now, it has been refused an appeal by the Supreme Court of Ohio. Petitioner, The City Hospital, contends that the Ohio Rules of Appellate Procedure, as applied to the Petitioner herein, deprived the Petitioner of due process and equal protection of the law as provided for in the United State and Ohio Constitution.

A. The Statute.

Ohio Revised Code § 2711.21(C) provides:

> "(C) If the decision of the arbitration board is not accepted by all parties thereto, the pleadings shall be amended to aver both the fact that the controversy was submitted to an arbitration board and the decision of the arbitration board. The decision of the arbitration board, and any dissenting opinion written by any board member, shall be admitted into evidence at trial upon the offer of any party, if the court conducts a review of the arbitration decision and any other relevant information submitted by the parties and concludes that:

(1) The findings of fact by the arbitration board were not clearly erroneous;

(2) The decision is in accordance with applicable law;

(3) The procedures required for conducting the hearing and rendering the decision were followed fairly and properly without prejudice to either party."

B. The Rules.

Rule 1 of the Ohio Rules of Appellate Procedures provides that, "These rules govern procedure and appeals to Courts of Appeals from the trial courts of record in Ohio." The Ohio Rules of Appellate Procedure result from the Ohio Supreme Court's power to prescribe rules governing practice and procedure in all courts of the State granted in the Constitution of Ohio pursuant to Ohio Constitution, Article IV, Section 5(B).

Appellate Rule 3(A) provides an appeal as of right shall be taken by filing a Notice of Appeal with the clerk by the trial court within the time allowed by Rule 4. Appellate Rule 4 provides that:

"In a civil case the Notice of Appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from."

Appellate Rule 3(C) provides that:

"The Notice of Appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the Appellant added, as appropriate."

Appellate Rule 3(C) suggests the use of form 1 in the Appendix of Forms, but mandates no particular form nor language.

C. The Trial Court, Court of Appeals, and the Supreme Court of Ohio's Decisions.

The Common Pleas Court denied Petitioner a jury trial in his order of August 12, 1985. The trial judge said:

> "The Defendant, City Hospital of Bellaire, has not followed the procedure as set forth in § 2711.21 and the Court can find no legal justification to vacate its judgment entered March 22, 1985 and said Defendant's motion to amend pleadings and for a trial date filed April 2, 1985 is not within time. Therefore, both motions are hereby overruled."

The Court of Appeals, Belmont County, Ohio, Seventh Appellate District, *sua sponte* summarily dismissed the Notice of Appeal as untimely filed. The Court stated, "This rule [4(A)] is mandatory and this Court has no discretion to allow delayed appeals in a civil matter." As shown earlier, two of the three Appeals Court Judges in their concurring opinion found this to be unfair.

The Ohio Supreme Court's order dismissed the City Hospital of Bellaire's appeal on January 22, 1986. Out of the seven Justices to hear the request, *three* of the seven, Justices Holmes, Brown and Wright, J.J. dissented from the dismissal. They brought the total to 5 Judges who felt the procedures here to be patently unfair.

REASONS FOR GRANTING THE WRIT

I. The Strict Application Of Ohio Rule Of Appellate Procedure On The Facts Of This Case Has Deprived Petitioner Of The Due Process Of Law And The Equal Protection Of The Laws.

A. *Petitioner Has Been Deprived of Due Process of Law.*

The issue in this case presents an important and recurring question of constitutional law that should be addressed by the Court; whether the strict application of procedural rules, in a manner that precludes any discretionary regard for the unique facts and circumstances of

a particular case, can be so unfair as to deprive a litigant of due process and the equal protection of the laws.

In this case, Petitioner timely, and formally, notified both the state court and opposing counsel of its initiation of an appeal of the $675,000 arbitral award rendered against it. Petitioner provided such notice to the court system, and to its opponent, and pursued the appeal in the normal manner by placing the notice of appeal in the mail. For some reason, clearly beyond Petitioner's control, the notice of appeal was never docketed as having been filed. The letter was never returned and it is reasonable to presume that the notice *may have been* properly delivered to the Court, but somehow mishandled after delivery, filed in the wrong case, or remains unopened and misplaced somewhere in the court system itself. Or, less likely, it may have been mishandled by the postal service, sent to the wrong place, or similarly misplaced by the postal system. In dismissing the appeal, on the basis of an absolute, literal application of Appellate Rule 4(A), the Ohio courts effectively held that any inquiry into the reason why the appeal was not filed, was barred.

No plausible state interest could justify this approach to the state procedural rule. Petitioner's opposing counsel timely received a copy of the notice of appeal: No *party* has, therefore, been prejudiced in any way by the technical deviation from the rules. Indeed, the purpose of a notice of appeal, in Ohio, "is to apprise the opposite party of the taking of an appeal." *Capital Loan and Savings Co.* v. *Biery*, 134 Ohio St. 333 at 339 (1938). Clearly, the only purpose of the rule was satisfied here.

Nor has the state court system itself been prejudiced: The timely request for preparation of the transcript for purposes of appeal satisfied the state interest in the efficient prosecution of judicial proceedings. The State's interest was clearly satisfied by that notice, and the notice timely provided to the plaintiff. No state interest is served by denying an appeal in these circumstances.

At the same time, an arbitral judgment of $675,000 has been imposed on Petitioner. That award has been rendered, and Petitioner denied any opportunity to defend against it. Indeed, Petitioner will be forced to pay this award without any trial, or hearing, whatsoever. In these unique circumstances, the failure to consider Petitioner's claim, depriving it of any defense to the plaintiff's claim, has deprived Petitioner of due process of law and equal protection of the laws.

The Fourteenth Amendment to the United States Constitution [1] states, in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

At the outset, it is beyond question that the word "person" as used in the Fourteenth Amendment, includes corporations, at least insofar as it prohibits a state from depriving them of property without due process of law. *Covington & Lexington Turnpike Rd. Co.* v. *Sandford*, 164 U.S. 560 (1896). It is also not subject to question that the word "State" as used in the Fourteenth Amendment includes instrumentalities and agencies of a state, including the judicial branch of government as well as the state itself. *NAACP* v. *Alabama*, 377 U.S. 288 (1964). Thus, the United States and Ohio Constitutions mandate that The City Hospital be afforded due process of law in proceedings before the Courts of the State of Ohio.

While the phrase "due process of law" has never been susceptible of precise judicial definition, one of the definitions which has received judicial approval on numerous occasions was first offered by Daniel Webster in the celebrated *Dartmouth College* case:

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[1] The Constitutional guarantee of due process and equal protection of law found in the Fourteenth Amendment to the U.S. Constitution and in various sections of the Ohio Constitution have been held by the Supreme Court of Ohio to be "substantially equivalent". *State, ex. rel. Heller* v. *Miller*, 61 Ohio St. 2d 6, 8 (1980).

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." *Dartmouth College* v. *Woodward*, 4 L. Ed. 629, 645 (1819).

All accepted definitions of "due process of law" have one thing in common. Notice to all parties of claims made against them, and an opportunity to be heard on such claims, are required under any definition of "due process of law". *Boddie* v. *Connecticut*, 401 U.S. 371, 378, (1971).

Due process analysis proceeds essentially in two stages. The first inquiry raises the question whether there has been a deprivation of some form of "property" protected by the Fourteenth Amendment. Here, the issue is well settled. Petitioner has been deprived of the right to appeal, and thus to vindicate its legal claims, a deprivation of a protectible property interest, in itself. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982). To arbitrarily deny the right of recourse to the appellate process, is itself a due process violation.

In this case, however, the deprivation of "property" is even more clear than in *Logan*: In *Logan*, the appellant was deprived of an inchoate claim that he sought to vindicate in the courts; in this case, Petitioner has not only been deprived of recourse to the courts, but has had judgment rendered against it for $675,000. Those dollars represent a substantial amount of "property" assuredly within the reach of the due process clause. An arbitrary denial of the right to defend against a claim strikes nearly at the core of due process concerns, and must be justified by some rational reason. *E.g.*, *Hammond Parking Co.* v. *Arkansas*, 212 U.S. 322, at 351 (1909).

It is also clear that Petitioner has not been afforded an adequate opportunity to vindicate its legitimate defenses

by virtue of the state court's blind adherence to the procedural rule, even in the face of the knowledge that in this case the application of the rule was patently unfair. As noted above, no state interest supports the denial of Petitioner's right to appeal in these circumstances, where both Petitioner's adversary and the court system received notice of the taking of the appeal. Moreover, it could not be said on this record that the failure to file this notice of appeal resulted from *Petitioner's* default of a "reasonable procedural requirement." On this record, the error could be attributed to the court system (or the mail system) as easily as to Petitioner. Yet without any inquiry into fault, or the reasonableness of Petitioner's conduct, the appeal was disallowed on the basis of errors more properly attributable to the State itself than to Petitioner. This is a deprivation of due process. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433-38.

Where there has been no bad faith, willfulness, or fault on the part of petitioner, and where the procedural "default" was "fostered neither by its own conduct nor by circumstances within its control," the loss of the right to prosecute a claim—and the imposition, on a defendant, of a judgment of the magnitude at issue here—violates the fundamental requirements of due process. *See Societe Internationale* v. *Rogers*, 357 U.S. 197 at 210-12 (1958).

The thirty-day limitation for filing a Notice of Appeal is a procedural limitation on the City Hospital's ability to assert its rights. In this respect, some form of hearing is required before the Petitioner is deprived of its protected property interests. At the very least, the Petitioner was deprived of its opportunity to present evidence to the state courts on the appropriate filing of the Notice of Appeal. Here, the state system itself destroyed the City Hospital of Bellaire's property interests, by operation of law, by failing to allow the Petitioner to present evidence that the Notice of Appeal was properly mailed

and received by the Clerk's Office well within the thirty-day limitation period. This is precisely the type of conduct the Fourteenth Amendment protects. The Fourteenth Amendment requires the City Hospital be given "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), "for a hearing appropriate to the nature of the case," *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). *Boddie* v. *Connecticut*, *supra*. This is such an opportunity that the City Hospital of Bellaire was denied.

An expression often heard is that every litigant is entitled to a trial and at least one review. "Being remedial, appeals and the right of appeal, are favored by the law." 4 Corpus Juris Secundum 88, *Appeal and Error*, Section 20. In the instant case, a situation has developed which demands a remedy. The Petitioner has never had its jury trial (nor any trial) in the Common Pleas Court. Following the trial court decision of August 12, 1985, counsel for The City Hospital mailed the Notice of Appeal well within the time required by App. R. 4(A). On September 5, 1985, counsel for Petitioner mailed a request for transcript of proceedings for inclusion in the record on appeal of the case. This request for transcript of proceedings was filed on September 6, 1985.

Thereafter, after having been notified by counsel for opposing party that the Notice of Appeal was not docketed in the Clerk's Office, counsel for The City Hospital resubmitted a Notice of Appeal which was filed on September 30, 1985. The Court of Appeals' *sua sponte* dismissal of the Notice of Appeal herein deprives The City Hospital of due process of law as guaranteed by the United States and Ohio Constitutions. It is respectfully submitted that this Honorable Court should grant the Petitioner's Writ of Certiorari and allow the appeal on the merits.

B. *Petitioner Has Been Deprived of Equal Protection of the Laws.*

Because the manner in which the procedural rule was applied in this case was without any rational basis, it violates the equal protection clause as well. In this case, Petitioner has been singled out for disqualification of its appeal, not by its own actions, but by the random, arbitrary actions of the State itself. Petitioner proceeded just as have thousands of previous litigants whose appeals have been successfully filed and docketed. This appeal was not heard, and there is no conceivable rationale that would support the State in denying the appeal. In these circumstances, there is a deprivation of the right to equal justice under law that the Fourteenth Amendment guarantees. *See Logan* v. *Zimmerman*, *supra*, at 438-42 (concurring opinion); 443-44 (concurring opinion).

II. The Decision Below Represents A Marked Departure From The Standards That Usually And Historically Govern The Application Of Such Rules To Unique Facts.

These Issues Are Of Great Importance In The Adjudication Of Cases On Their Merits Thereby Ensuring Due Process And Equal Protection Of Law And In Holding Inviolate The Right To Trial By Jury.

A. *In This Case, Petitioner Acted Reasonably In Relying On Mail Delivery of the Notice of Appeal.*

The Supreme Court of Ohio upheld the dismissal by the Court of Appeals. Three Justices dissented in the Court's decision not to hear the appeal on its merits.

App. R. 4 provides in part:

> "In a civil case the notice of appeal required by Rule 3 shall be filed with the Clerk within thirty days of the date of the entry of the judgment or order appealed. . . ."

This Court has held that reliance on the normal course of delivery of mail is reasonable and, therefore, may be the basis for the Court to excuse an otherwise untimely filing of a Notice of Appeal. *Fallen* v. *United States*, 378 U.S. 139 (1964). While the petitioner recognizes that depositing a notice of appeal in the mail is not equivalent to filing it, where here, as in *Fallen*, there are other unique circumstances which evince the notice of appeal as being timely filed, courts have allowed the cause to be heard on its merits. Courts have allowed such causes to be heard on their merits in *Sanchez* v. *Bd. of Regents*, 625 F.2d 521 (5th Cir. 1980) and *Gibbs* v. *Frisco City Police Dept.*, 626 F.2d 1218 (5th Cir. 1980). In those instances, the Courts have held an evidentiary hearing where it has been established without dispute that a mailing of a notice of appeal was consummated well within the applicable time period. In *Gibbs*, *supra*, the Court held that reliance on the mail was excusable neglect and held that the Notice of Appeal was timely filed and proceeded to a review of the causes on the merits. There the Plaintiff's counsel did not check on the filing of the document because he had allowed twice the normal time for a delivery, when, in fact, it took three times the normal time for delivery.

And in *Wright* v. *Deyton*, 757 F.2d 1253 (11th Cir. 1985), the Court followed *Fallen* v. *United States*, *supra*; and remanded the cause. The Court noted that the "inquiry should focus on two distinct periods. First, the district court should examine the pre-mailing delay to see if there is something akin to 'excusable neglect' or 'good cause' which excuses the delay. Second, the district court should determine when the document was mailed and whether, in the ordinary course of events, the clerk would have received the letter by the applicable filing deadline."

Herein, it is uncontested that the Notice of Appeal was mailed on August 30, 1985. The envelope containing

the Notice of Appeal was stamped and placed in the United States Mail for delivery to the Clerk, a distance of appproximately 35 miles from counsel's office. An affidavit to this effect is of record. (App. 50a-51a). On that same date, copies of the Notice of Appeal were sent by ordinary mail to Respondent's counsel, Richard L. Lancione in Bellaire, Ohio, and John G. Lancione in Cleveland, Ohio. (App. 43a and 44a). Copies of the Notice of Appeal *were received by each attorney* for Respondent. The Clerk of Court's Office has yet to receive a copy of the August 30, 1985, Notice of Appeal. The Notice of Appeal and accompanying letter were not returned by the United States Postal Service to Petitioner's counsel. (App. 51a).

B. *Petitioner Was Entitled to Rely On the Clerk of Courts.*

This Court has also established a limited exception so that "[U]nder certain 'unique circumstances,' an appellate tribunal may have jurisdiction to hear an appeal that was not filed within the prescribed time limits."

The "unique circumstances" doctrine was articulated by this Court in three decisions. In *Harris Truck Lines* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), this Court allowed a notice of appeal, filed after the thirty day limit, ". . . in light of the unique circumstances of a case, . . ." *Harris Truck Lines, Inc.*, *id.* at p. 217.

In *Thompson* v. *Immigration Services*, 375 U.S. 384 (1964) (per curiam), this Court held that an appeal from the denial of a petition for naturalization should not be dismissed as untimely under F.R.C.P. 73(a) by the Federal Court of Appeals if taken within sixty days after denial of the post-trial motion. And in *Wolfsohn* v. *Hankin*, 376 U.S. 203, *Reh. Den.*, 376 U.S. 973 (1964), the Court held that a Court of Appeals had improperly

dismissed an appeal as untimely where the District Court from which the appeal was taken granted the Appellant an extension of time within which to move for a rehearing under F.R.C.P. 59, and the subsequent Notice of Appeal was filed within thirty days after the denial of the motion for rehearing, even though the motion for rehearing was not filed until 35 days after the entry of the judgment.

The appropriate circumstances for applying the "unique circumstances" doctrine is that courts permit an appellant to maintain an otherwise untimely appeal under unique circumstances in which the appellant reasonably and in good faith relied upon official action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the action occurred prior to the expiration of the official time. This is particularly appropriate where an appellant could have given timely notice had he not been lolled into inactivity.

It is respectfully submitted that the instant cause fits squarely within the letter and spirit of the "unique circumstances" doctrine. Here, the Petitioner mailed the Notice of Appeal on August 30, 1985. The Petitioner thereafter, on September 5, 1985, mailed the Request for Transcript to the Belmont County Clerk of Courts. The request for transcript was received and filed by the Clerk on September 6, 1985. It is without question that the Petitioner could reasonably and in good faith rely on the Clerk of Courts, a functionary of the Court, to notify the Petitioner that the Clerk had not received the Notice of Appeal when the Clerk received and filed the Request for Transcript Since the 30 day appeal period did not expire until September 12, 1985, the Petitioner, upon being notified by the Clerk, could have made alternative filing arrangements well within the thirty day appeal period.

In a case with similar facts, the Court of Appeals for the 11th Circuit held that if the appellant reasonably and

in good faith relied upon a representation by the District Court prior to the expiration of the official time period that his Notice of Appeal would be timely if mailed on a certain date and was thus lolled into failing to arrange for an alternative method of filing or moving for an extension of time to file, the appeal would not be dismissed as untimely. *Willis* v. *Newsome*, 747 F.2d 605 (11th Cir. 1984).

A Notice of Appeal which was mailed well within the rule (here twelve days), and which for some unknown reason was never received by the Clerk's Office, should be deemed to be timely filed.[2] This is especially so in this case where the opposing party received a copy of the Notice of Appeal well within rule; and where there was also a Request for Transcript for appeal purposes mailed and filed by the Clerk's Office within rule, which was also received by the opposing party within rule.

C. *The Filing of the Request for Transcript is Substantially in Compliance With Rule of Appellate Procedure 3(C).*

There have been numerous instances where Federal Courts have allowed a cause to be heard on its merits where substantial compliance with the Federal Rules of Appellate Procedure have been followed. In *United States* v. *Neal*, 747 F.2d 1022 (10th Cir. 1985), the Court noted, "The question of whether a document is legally sufficient to provide a district court with jurisdiction is one of law and not of fact."

---

[2] Petitioner does not claim that the 30 day notice of appeal filing requirement is unconstitutional on its face. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *United States* v. *Robinson*, 361 U.S. 220, 229 (1960); *Zier* v. *Bureau of Unemployment Compensation*, 151 Ohio St. 123 (1949); *Lunch Co.* v. *Glander*, 147 Ohio St. 147 (1946). It is as *applied* on the facts herein, that it constitutes a denial of due process and equal protection of the laws. This deprivation is especially prejudicial when it also results in a denial of the right to jury trial.

In *United States* v. *UNI Oil, Inc.*, 710 F.2d 1078 (5th Cir. 1983), the Court of Appeals allowed a case to be heard on its merits where the government's notice of appeal was served on counsel for the Defendants and plainly demonstrated an intention to appeal from the judgment below. The Court found this to be sufficient notice under the appellate rules. In *United States* v. *Ward*, 696 F.2d 1315, (11th Cir. 1983) the Court found that "under a liberal reading of Fed. R. App. 3(c), which enumerates the substance of a Notice of Appeal, the appellant's letters to the Federal District Court expressing his intent to appeal his conviction and requesting an appointment of an attorney to represent him in such proceeding satisfy the requirements of the rule. See *also United States* v. *Hoye*, 548 F.2d 1271, 1272 (6th Cir., 1977).

And in *Stevens* v. *Heard*, 674 F.2d 320 (5th Cir., 1982), the Court held that the burden of establishing the sufficiency of a notice of appeal should be on the party who failed to submit the proper document and should a clerk deny filing a pleading or other document which is claimed to be a notice of appeal, the party whose document is denied filing may raise as a judicial issue whether the document was tendered timely and was legally sufficient to serve as a notice of appeal. There, the Court in citing *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974), concluded that a document, which was timely filed with the Court, would be sufficient to perfect an appeal if it "clearly evinces an intent to appeal." The Court specifically found that the filed document should put both the Court and the opposing party on notice. There a Certificate of Probable Cause was held as a matter of law to be equivalent to a notice of appeal under Appellate Rule 3. *Cobb* v. *Lewis, supra.*

In the instant case, it is undisputed that the request for transcript was timely filed. (App. 45a) The request for transcript put both the Court and the opposing party on notice. In fact, the opposing party received a copy

of the unfiled notice of appeal. (App. 43a-44a) The only question would be whether the request for transcript which was timely filed is equivalent to a notice of appeal. The request for transcript clearly indicated the City Hospital of Bellaire's intent to appeal. The receipt and filing by the Clerk's Office gave direct notice of the City Hospital's intent to the Court and notice to the opposing party.

And, in *NOA* v. *Key Futures, Inc.*, 638 F.2d 77 (9th Cir. 1980), the Court held that a stipulation to the entry of a new judgment served as an effective notice of appeal. Specifically, the Court noted that: "documents which are not denominated notices of appeal will be so treated when they serve the essential purpose of showing that the party intended to appeal, are served upon the other parties to the litigation, and are filed in Court within the time period otherwise provided by Rule 4(A)." The only apparent purpose of the Request for Transcript herein was to permit a proper appeal of the trial court's judgment. The City Hospital intended to appeal, the Defendants had notice of the City Hospital's intent to appeal and believed the City Hospital was appealing, and all parties were proceeding upon the assumption that a viable appeal was pending.

Curiously, the State Court decision herein is actually contrary to prior rulings involving the liberal construction and application of Appellate Rules. In *Maritime* v. *Marina*, 70 Ohio St. 2d 257 (1982), the Ohio Supreme Court stated that a strict construction of the appellate rules is inconsistent with the general attitude taken by the Court towards the construction of procedural rules, case law of Ohio, the purpose underlying the Notice of Appeal requirement, as well as with the position of the United States Supreme Court. *Id.* at 258. The Court went on to state:

> "This Court has long recognized that, in construing the Rules of Appellate Procedure, the law favors and

> protects the right of appeal and that a liberal construction of the rules is required in order to promote the objects of the Appellate Procedure Act and to assist the parties in obtaining justice. *In Re: Guardianship of Love* (1969), 19 Ohio St. 2d 111, 115. See, also, *In Re: Guardianship of Wisner* (1947) 148 Ohio St. 31, 34-35." * * * The legislative purpose through the act was obviously to liberalize procedure upon appeals and to prevent technicalities from being fatal to substantive rights." *Couk* v. *Ocean Accident & Guar. Corp., Ltd.* (1941), 138 Ohio St. 110, 115."

As the Ohio Supreme Court stated in *Capital Loan & Savings Co.* v. *Biery*, 134 Ohio St. 333 (1938), the purpose of the Notice of Appeal is to apprise the opposite party of the taking of an appeal. If this is done within rule so that there is no misundertanding between the parties, the purpose of the notice of appeal is accomplished. *Couk* v. *Ocean Accident & Guar. Corp., supra,* 116 and *Maritime* v. *Marina, supra.*

In *Maritime, supra,* the Ohio Supreme Court further noted that in the spirit of liberal construction of procedural questions and in light of the policies underlying the notice of appeal requirement, the Court found that appellants preserved their rights to appeal. Although the notice of appeal may not have complied in a technical sense with the rule, the notice nonetheless served the purpose intended. The record here indicates that the Court of Appeals and the Respondent were fully advised of the Petitioner's intention to appeal. As stated by Judge Cox:

> "I feel that under the facts of this case, in which all parties agree that the notice of appeal was mailed well within rule, and for some unknown reason was never received by the Clerk's Office, that the appeal, in all fairness, should not be dismissed."

The opposing party was fully advised in that her attorneys, whose affidavits are of record, received copies of the Notice of Appeal of The City Hospital by ordinary mail during the first week in September, 1985.

It is obvious that the clear and expressed intention of The City Hospital was to appeal from the August 12, 1985, final judgment of the trial court. The Notice of Appeal was mailed on August 30, 1985. The request for transcript was mailed on September 5, 1985, and was received and filed by the Clerk's Office on September 6, 1985. The documents did not mislead the Respondent. Under these circumstances, Respondent was not prejudiced or taken by surprise.

The Ohio Supreme Court's dismissal herein is also contrary to its recent decisions involving Appellate Rule 3(C). App. R. 3(C) suggests the use of Form No. 1, but mandates no particular form nor language. The Ohio Supreme Court has held that the filing of the transcript and the record with the Trial Court creates a presumption that the Notice of Appeal was filed. *Dudukovich* v. *Housing Authority*, 58 Ohio St. 2d 202, 205 at ftn. 3 (1979). This presumption was recently applied in *Roseman* v. *Reminderville*, 14 Ohio App. 3d 124, 126 (1984). Furthermore, in appropriate circumstances, the Ohio Supreme Court has allowed an amendment to a Notice of Appeal which was timely filed. In *Richards* v. *Industrial Commission*, 163 Ohio St. 439 (1955), in discussing the statutory predecessor to App. R. 3(C), the Ohio Supreme Court stated that in appropriate circumstances other documents can constitute a notice of appeal.

In *Capital Loan and Savings Co.* v. *Biery*, 134 Ohio St. 333, at 339 (1938), the Ohio Supreme Court found that a journal entry overruling a motion for a new trial and incorporating a Notice of Appeal was sufficient. There, the Court stated:

> "Although not complying in a technical sense with [the rule], it appears to have served the purpose intended.
>
> Manifestly, the purpose of such a notice is to apprise the opposite party of the taking of an appeal. Since such journal entry was approved by counsel for both

parties, both had actual notice thereof. Under the circumstances, Plaintiff could not be prejudiced or taken by surprise." *Id.* at 339.

Obviously, the primary objective of the Notice of Appeal is to make it known that an appeal is being taken. *Cobb* v. *Lewis, supra.* Nothing more than such notice is required to vest jurisdiction of the cause in the Court of Appeals. Furthermore, it has been stated that the principle function of a Notice of Appeal is to advise the opposing party of the taking of an appeal. *Capital Loan & Savings Co.* v. *Biery, supra*; *Cobb* v. *Lewis, supra.* Statutes relating to appeals are remedial and should be liberally construed to the end that the right of appeal may not be defeated, and were not adopted to set traps and pitfalls by way of technicalities for unwary litigants. *Foman* v. *Davis*, 371 U.S. 178 (1962); *Conley* v. *Gibson*, 355 U.S. 41, (1957); *Willis* v. *Newsome, supra.* Nor were the Rules intended to be a rigid code to have an inflexible measuring irrespective of the circumstances. *Fallen* v. *United States, supra.*

Herein, the adverse party actually received a copy of the Notice of Appeal within the time for filing. They further received a copy of the Request for Transcript within the time for filing of the Appeal. The Request for Transcript contained enough information to apprise the opposite party of the particular judgment which was sought to be reviewed. In *United States* v. *Merrick*, 223 F. Supp. 908 (W.D. Mo. 1963), the Court indicated that the Defendant's letter request for a copy of the transcript could have been treated as a Notice of Appeal except for the fact that it was not filed within time in that case. Furthermore, the United States Court of Appeals for the Ninth Circuit in *Thomas* v. *United States*, 328 F.2d 607, 608 (9th Cir. 1964), stated that they were unable to find in the record as timely filed ". . . any document which, by the most liberal construction, can be construed to be a notice of appeal." It is respectfully submitted that under the liberal construction that must

be given the Request for Transcript, the same, under the facts of this case, must be treated as a Notice of Appeal.

On the facts of this case, to refuse to find that sufficient notice of appeal was filed, would be to elevate technicalities to a new height, and to subvert rather than promote substantial justice and the pursuit of justice. Since the Respondent received a copy of the mailed, but purportedly unfiled, Notice of Appeal and the timely filed request for preparation of the transcript for appeal purposes, to deny Petitioner's appeal herein constitutes a denial of due process and equal protection of law.

The Federal Courts have long recognized a common sense approach concerning appellate rules 3 and 4 and have not insisted upon literal compliance in cases in which it cannot fairly be exacted. In *Alley* v. *Dodge Hotel*, 501 F.2d 880 (D.C. Cir. 1974), the Court held that ". . . a filing requirement is met by a positive, substantial and unequivocal effort to discharge it, and that innocuous irregularities incidental to such an endeavor should be disregarded when considerations of fairness dictate that course. . . . [I]t would . . . be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the [rules] is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with [them] defeats substantial rights." *Alley*, *supra* at p. 884. See also *Crump* v. *Hill*, 104 F.2d 36, 38 (5th Cir. 1939).

CONCLUSION

To allow the appeal herein would reaffirm the mandate of Civil Rule 1(b) which the Ohio Supreme Court has recently applied to numerous cases, except the instant appeal. In construing Civ. R. 4.4(A) in *Brooks* v. *Rollins*, 9 Ohio St. 3d 8 (1984) Justice Brown stated in his concurring opinion at p. 11:

> "The flawless analysis by Justice William B. Brown of Civ. R. 4.4(A) and R.C. § 2703.14(L) creates a

> legal precedent constituting the quintessence of justice in this case and will cause just results to be reached in many future cases with the same or similar issues. The precedent we establish today is a clarion judicial call that this Court will fulfill the main objective of justice " 'that cases should be decided on their merits,' rather than upon procedural niceties and technicalities," a fundamental tenant of justice espoused in many recent cases. . . . This basic theme of justice fulfills the Civ. R. 1(B) mandate that '[t]hese rules shall be construed and applied to effect just results by eliminating delay * * * and all other impediments to the expeditious administration of justice.' " (Citations omitted)

It is respectfully submitted that the Petitioner's Constitutional rights to due process and equal protection of law, and indeed to a jury trial, have been deprived by the dismissals of the appeals *sua sponte*. This Court should, it is respectfully submitted, grant the Petition for the entertaining of the appeal.

For the foregoing special and important reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

GERALD P. DUFF
(Counsel of Record)
HANLON, DUFF & PALEUDIS
CO., LPA
46770 National Road West
St. Clairsville, Ohio 43950
Telephone: (614) 695-1444
Counsel for the Petitioner
The City Hospital of Bellaire

April 21, 1986

Supreme Court, U.S.
FILED
APR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

85 - 1715

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY HOSPITAL OF BELLAIRE,
Petitioner,

v.

NANCY DELGUZZO, EXECUTRIX, ETC.,
Respondent.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

GERALD P. DUFF
(Counsel of Record)
HANLON, DUFF & PALEUDIS
Co., LPA
46770 National Road West
St. Clairsville, Ohio 43950
Telephone: (614) 695-1444
Counsel for the Petitioner
The City Hospital of Bellaire

April 21, 1986

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THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM

To wit: January 22, 1986

Case No. 85-1801

NANCY DELGUZZO, EXRX.,
Appellee,

v.

CITY HOSPITAL OF BELLAIRE,
Appellant.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Belmont County to certify its record and the claimed appeal as of right from same said Court to certify its record and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overrruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by G. P. Duff.

/s/ Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date Feb. 06, 1986.

JAMES WM. KELLY
Clerk

/s/ Sam J. Adkins
Deputy

OHIO OFFICIAL REPORTS—ADVANCE SHEETS

Vol. 21, No. 7

OHIO
SUPREME COURT'S ANNOUNCEMENTS

Wednesday, January 22, 1986

DISMISSALS, SUA SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND MOTION FOR LEAVE TO APPEAL OR MOTION TO CERTIFY RECORD OVERRULED

* * * *

85-1801

Nancy DELGUZZO, Exrx.

v.

CITY HOSPITAL OF BELLAIRE. BELMONT COUNTY

Holmes, Brown and Wright, JJ., dissent

STATE OF OHIO)
) ss:
BELMONT COUNTY)

IN THE COURT OF APPEALS OF OHIO
SEVENTH DISTRICT

Case No. 85-B-33

NANCY DELGUZZO, EXECUTRIX, ETC.,
Plaintiff-Appellee,

—vs—

JOSEPH L. WILLIAMS, M.D., *et al.*,

and

CITY HOSPITAL OF BELLAIRE,
Defendant-Appellant.

JOURNAL ENTRY

Notice of Appeal filed on September 30, 1985 from a final judgment filed August 12, 1985 sua sponte dismissed as untimely filed.

Rule 4(A) of the Ohio Rules of Appellate Procedure states:

> "In a civil case the notice of appeal required by Rule 3 shall be filed with the Clerk of the trial court within thirty days of the date of the entry of judgment or order appealed from."

This rule is mandatory and this court has no discretion to allow delayed appeals in a civil matter.

Appeal dismissed. Costs to be taxed against appellant.

[Filed Oct. 23, 1985]

/s/ Joseph Donofrio

/s/ Edward Cox

/s/ Joseph E. O'Neill
Judges

COX, J.

I feel that under the facts of this case, in which all parties agree that the notice of appeal was mailed well within rule, and for some unknown reason was never received by the clerk's office, that the appeal, in all fairness, should not be dismissed.

However, Ohio does not have a rule similar to the federal rules which gives this court any discretion in the matter.

I find the enforcement of Ohio Rules of Appellate Procedure 4(A), under this statement of facts, to be patently unfair, and I signed the entry of dismissal only because I find that I have no authority to do otherwise.

APPROVED:

/s/ Edward A. Cox
EDWARD A. COX
Judge

Concur—J. DONOFRIO

[Filed Oct. 23, 1985]

IN THE COURT OF COMMON PLEAS
OF BELMONT COUNTY, OHIO

Case No. 80-CIV-134

NANCY DELGUZZO, EXECUTRIX, ETC.,
Plaintiff

VS.

JOSEPH L. WILLIAMS, M.D., *et al.*,
Defendants

JOURNAL ENTRY

The Motion to Vacate and the Motion to Amend Pleadings and for a trial date of the Defendant, City Hospital of Bellaire, were submitted to the Court upon the memoranda of the said Defendant; and of the Plaintiff, Nancy DelGuzzo, Executrix. Upon consideration of all the matters before it, and a review of the complete file herein, it is hereby ordered that both Motions are overruled.

Special Entry.

/s/ Charles F. Knapp
Judge

[Filed Aug. 12, 1985]

STATE OF OHIO, COUNTY OF BELMONT, SS:
IN THE COURT OF COMMON PLEAS

Case No. 80-CIV-134

NANCY DELGUZZO, EXECTRUIX, *et al.*,
Plaintiffs

vs.

JOSEPH L. WILLIAMS, M.D., *et al.*,
Defendants

[Filed Aug. 2, 1985]

OPINION AND DECISION

Decided by the Honorable Charles K. Knapp

August 2, 1985

Knapp, J:

The defendant, City Hospital of Bellaire, has filed two motions; the first motion is to vacate the court's judgment entered March 22, 1985; the second motion is to amend pleadings and request a trial date.

The court has re-examined the complete file of this matter and in particular the court's order of September 21, 1982 and its opinion and decision dated March 20, 1985.

On September 21, 1982 the court entered an order that required this case to be arbitrated and a portion of that order reads as follows:

> "The report and award unless rejected pursuant to law shall be final."

The majority of the arbitration panel filed their report and award with the court on August 3, 1984. On October 31, 1984, the defendant, City Hospital of Bellaire, filed a motion requesting that the court modify the arbitration award by deducting therefrom the value of the covenant previously entered into between the plaintiff and defendants, Joseph L. Williams, M.D., Bellaire Medical Group, Inc., Angelo J. Antalis, M.D., Peter Lancione, M.D., and their surety, The Medical Protective Company of Fort Wayne, Indiana. The court can come but to only one conclusion; that said motion was filed under Revised Code Section 2307.32. It should have been filed under Section 2711.11.

Section 2711.21 of the Ohio Revised Code sets forth that the arbitration proceeding shall be conducted in accordance with Sections 2711.06 to 2711.16.

Section 2711.13 provides in part as follows:

> "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or

his attorney within three months after the award is delivered to the parties in interest * * * *"

The defendant, City Hospital of Bellaire, has not followed the procedure as set forth in Section 2711.21 and the court can find no legal justification to vacate its judgment entered March 22, 1985 and said defendant's motion to amend pleadings and for trial date filed April 2, 1985 is not within time. Therefore, both motions are hereby overruled.

Counsel for plaintiff is instructed to prepare the appropriate docket and journal entry consistent with this opinion and decision and to file same with the court within 15 days. Cost to the defendant, City Hospital of Bellaire.

COURT OF COMMON PLEAS
BELMONT COUNTY, OHIO

Case No. 80-CIV-134

NANCY DELGUZZO, EXECUTRIX,
Plaintiff

vs.

JOSEPH L. WILLIAMS, M.D., *et al.*,
Defendants

JUDGMENT JOURNAL ENTRY

This matter came on to be heard on the Motion of the Defendant, The City Hospital of Bellaire, to modify the award of the arbitrators, and on the Motion of Plaintiff to confirm the award. Both parties submitted supplemental memoranda.

The Court is of the opinion that the arbitrators in their majority opinion determined that the Defendant, The City Hospital of Bellaire, should pay $675,000.00 to the Plaintiff.

It is therefore ordered that the Motion of the Defendant, The City Hospital of Bellaire, to modify the award is hereby overruled.

The Motion of Plaintiff to confirm the award is hereby sustained. Judgment is hereby rendered in favor of Plaintiff and against the Defendant, The City Hospital of Bellaire, in the amount of $675,000.00, with interest from the date of this Entry.

Special Entry.

/s/ Charles F. Knapp
Judge

[Filed Mar. 22, 1985]

STATE OF OHIO, COUNTY OF BELMONT, SS:
IN THE COURT OF COMMON PLEAS

Case No. 80-CIV-134

NANCY DELGUZZO, EXECUTRIX, ETC.,
Plaintiff,

vs.

JOSEPH L. WILLIAMS, M.D., *et al.*,
Defendants.

[Filed Mar. 20, 1985]

OPINION AND DECISION

Decided by the Honorable Charles F. Knapp

March 20, 1985

KNAPP, J:

This cause came on for hearing on motion of the defendant, The City of Hospital of Bellaire, to modify the arbitration award and motion of plaintiff, Nancy DelGuzzo, Executrix, to confirm the arbitration award.

This decision and opinion is based on the oral arguments and testimony adduced at the hearing before the court on February 5, 1985 and memorandums submitted by the parties.

The motion of the defendant, The City Hospital of Bellaire, is not based on Revised Code Section 2711.11 entitled "Court May Modify Award." However, the court from the complete examination of the court's file including all the pleadings, memorandums, and in particular the arbitrators' findings of fact, both majority and minority opinions, finds that said findings of fact by the majority of the arbitration board are not erroneous, that the decision is in accordance with the applicable law, and that the procedures for conducting the hearing were fair, proper and without prejudice to either party.

The defendant, The City Hospital of Bellaire, has requested that the arbitration award be modified by deducting therefrom the value of the covenant previously entered into between plaintiff and the other defendants.

The City Hospital of Bellaire is relying on Revised Code Section 2307.32 and in particular paragraph (F). Said code section is entitled "Enforcement of contribution; elimination of action; effect of judgment findings by court or jury, release, etc." Paragraph (F) of said section reads as follows: "When a release or covenant not to sue to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: 1. It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms otherwise provide, but it

reduces the claim against the other to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; 2. It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."

The State of Ohio has modified the common law of contribution among joint tortfeasors by enacting Revised Code Section 2307.31 and 2307.32.

There is no question that the law in Ohio provides that if two or more persons are jointly and severally liable for a wrongful death there is a right of contribution among them irrespective of whether judgment has been recovered against all or any of them, Revised Code Section 2307.31 (A). The right exists only in favor of a person who has paid an amount in excess of his proportionate share. In determining the proportionate share that a tortfeasor should pay the relative degree of fault of the tortfeasor should be considered, Revised Code Section 23037.31 (F).

It appears from both the majority and minority opinions of the arbitrators that the focus was strictly on The City Hospital of Bellaire.

In the instant case the majority award of the arbitrators was as follows: "We, the undersigned, being two (2) of the arbitrators, do hereby find in favor of the Plaintiff and against the Defendant, The City Hospital of Bellaire, and assess damages in the amount of Six Hundred Seventy Five Thousand Dollars ($675,000.00) to the Plaintiff, Nancy DelGuzzo, Executrix of the Estate of Ettor DelGuzzo Jr."

The dissenting arbitrator stated as follows: "It is the recommendation of this arbitrator that final judgment be rendered in favor of Defendant, The City Hospital of Bellaire, in all respects.

To further bolster the court's conclusion that all three arbitrators were focusing strictly on the defendant, The City Hospital of Bellaire, the arbitrators knew that the other defendants had given a covenant not to sue and there was no attempt by the arbitrators to determine the degree of fault among the joint torfeasors.

The only calculation of damages in the majority opinion is based on Dr. Burke's testimony of earning capacity of the decedent in the amount of Six Hundred Seventy Five Thousand Dollars ($675,000.00). Without taking into consideration an increase in average base income or investment factor, this figure is the exact amount of the award, therefore, we must assume the loss of services, loss of companionship, and mental anguish were not considered in the award, because the arbitrators had knowledge of the covenant previously entered into between plaintiff and co-defendants.

The court is of the opinion that the arbitrators in their majority opinion determined the proportionate share that the defendant, The City Hospital of Bellaire, should pay, that being, Six Hundred Seventy Five Thousand Dollars ($675,000.00).

The motion of defendant, The City Hospital of Bellaire, to modify the award is overruled. The motion of the plaintiff to confirm the award is hereby sustained.

Judgment is hereby rendered in favor of plaintiff and against the defendant, The City Hospital of Bellaire, in the amount of Six Hundred Seventy Five Thousand Dollars ($675,000.00) with interest from the date of judgment.

Counsel for plaintiffs is to prepare a docket and journal entry in conformity with this opinion and decision and to submit same to the court within fifteen (15) days.

IN THE COURT OF COMMON PLEAS
OF BELMONT COUNTY, OHIO

Case No. 80-CIV-134

NANCY DEL GUZZO, EXECUTRIX OF THE ESTATE OF
ETTOR DEL GUZZO, JR., DECEASED,
Plaintiff

—VS—

DR. JOSEPH L. WILLIAMS, *et al.*,
Defendant

FINDINGS

We, the undersigned, being two (2) of the arbitrators, do hereby find in favor of the Plaintiff and against the Defendant, The City Hospital of Bellaire, and assess damages in the amount of Six Hundred Seventy Five Thousand ($675,000.00) to the Plaintiff, Nancy Del Guzzo, Executrix of the Estate of Ettor Del Guzzo., Jr.

/s/ Peter S. Olivito
PETER S. OLIVITO, Arbitrator
Suite 606-612 Sinclair Building
Steubenville, Ohio 43952
Telephone: (614) 283-3341

/s/ Rodney D. Hanson
RODNEY D. HANSON, Arbitrator
320 Howard Street
Bridgeport, Ohio 43912
Telephone: (614) 635-0162

PROOF OF SERVICE

A copy of the foregoing Findings have been mailed by regular United States mail, this 2nd day of August, 1984, to John G. Lancione, Attorney for Plaintiff, 1500 National City Building, Cleveland, Ohio 44114; Richard L. Lancione, Attorney for Plaintiff, 101 The Professional Complex, P.O. Box 0, Bellaire, Ohio 43906; Ted S. Cooper, Attorney for Defendant, Hayes, Cooper, Campbell and Prest, P.O. Box 819, Steubenville, Ohio 43952; and Gayle E. Arnold, Arbitrator, 1559 Broad Street, Columbus, Ohio 43215.

/s/ Peter S. Olivito
PETER S. OLIVITO, Arbitrator

/s/ Rodney D. Hanson
RODNEY D. HANSON, Arbitrator

IN THE COMMON PLEAS COURT
OF BELMONT COUNTY, OHIO

Case No. 80-CIV-134

NANCY DEL GUZZO, EXECUTRIX OF THE ESTATE OF
ETTOR DEL GUZZO, JR., DECEASED,
Plaintiff

—VS—

DR. JOSEPH L. WILLIAMS, *et al.*,
Defendants

FINDING OF FACT

The following finding of fact is made by the majority of the arbitration panel pursuant to the judgment entry dated September 21, 1982.

Plaintiff, Nancy Del Guzzo, is the surviving spouse of Ettor Del Guzzo, Jr., and the Executrix of his estate.

Defendant is The City Hospital of Bellaire, stiuated in the City of Bellaire, County of Belmont and State of Ohio.

On November 17, 1979, Ettor Del Guzzo, Jr., age forty-six (46) years, was brought to the emergency room of The City Hospital of Bellaire for the first time at 4:10 o'clock P.M. by the Bellaire Emergency Squad.

The emergency room record lists as a history of the complaint or injury that Ettor Del Guzzo, Jr., "was sweating and turned white. Pt passed out for approximately 5 minutes." This record also states that Ettor Del Guzzo, Jr., took some drugs all at once, got lightheaded and then nauseated and almost passed out. This was what had been told to Nurse Eleanor Chase by the emer-

gency squad which had brought Ettor Del Guzzo, Jr., to the emergency room. The record also indicates that upon examination, he was pale and diaphoretic. The diagnosis was "near syncope episode—probably due to medication." This diagnosis was entered on the record by Dr. Joseph L. Williams, the emergency room physician.

A policy existed in the emergency room at The City Hospital of Bellaire that whenever patients were brought to the emergency room, their personal physicians were to be notified. Although the emergency room record indicated that Dr. Peter Lancione was the family physician, neither Dr. Williams nor Nurse Eleanor Chase, a registered nurse working in the emergency room, notified Dr. Lancione that his patient was at the emergency room.

Ettor Del Guzzo, Jr., was sent home from the emergency room. Subsequently, Dr. Lancione called the emergency room to inquire of his patient's condition and Nurse Chase told him that the patient had gone home and that she was too busy and forgot to call Dr. Lancione.

At approximately 8:30 o'clock P.M. on the same day, Ettor Del Guzzo, Jr., was again brought to the same emergency room by the Bellaire Emergency Squad. Nurse Chase and Dr. Williams learned from a scanner report that Ettor Del Guzzo, Jr., was bleeding rectally; was cold and clammy; diaphoresing; and that a blood pressure could not be obtained.

Upon examination at the emergency room, he was found to be pale and diaphoretic. His blood pressure was 110/. A nasogastic tube was inserted and maroon blood was obtained. It was noted that there was a past history of ulcer disease. However, theer was no rectal examination made nor was there any testing of a stool specimen for blood.

As earlier, Dr. Lancione was not contacted by anyone in the emergency room. At 8:45 o'clock P.M., at the insistence of Nancy Del Guzzo, Dr. Williams called Dr. A.J. Anetalis.

As a result of this telephone commuication, at 9:00 o'clock P.M., Ettor Del Guzzo, Jr., was then admitted to the Step-Down Unit. This is an intermediate care unit between a critical care environment and a general hospital ward. A blood infusion was begun at 10:30 o'clock P.M. Although the Nurse's Observations state that Dr. Williams called at 11:00 o'clock P.M. to inquire as to the patient's condition, no physician saw him until 2:10 o'clock A.M. the following morning.

This was brought about by a call made to Dr. Anetalis at 1:20 o'clock A.M. by Nurse Mica Boso Van Fossen. At 1:35 o'clock A.M., Ettor Del Guzzo began deteriorating rapidly, yet no physician was called by the nursing staff until 1:50 o'clock A.M. when Dr. Anetalis was called.

Dr. Anetalis arrived at The City Hospital at 2:10 o'clock A.M. and Dr. Lancione, who had been called by Dr. Anetalis, arrived at 2:30 o'clock A.M. To this point, nothing had been done to determine the severity of the gastronintestinal bleeding and its origin.

The City Hospital of Bellaire had only two (2) units of blood on hand. Additional units were obtained from Wheeling Hospital in Wheeling, West Virginia, by the request of Dr. Jess S. Renedo, a pathologist from Wheeling Hospital and a friend of the Del Guzzo family who was called to The City Hospital by a family friend at approximately 3:00 o'clock A.M.

Dr. Lancione called Dr. Ghaphery, a surgeon, and he arrived at The City Hospital at 5:20 o'clock A.M. At 6:20 o'clock A.M., Ettor Del Guzzo, Jr., was taken to surgery. He expired at 2:55 o'clock P.M.

Despite the obvious signs of severe gastrointestinal bleeding, Ettor Del Guzzo, Jr., was permitted to exsanguinate without proper intervention by the personnel and staff of The City Hospital of Bellaire.

At page 33 of his deposition, Dr. Wilmer Leigh Thompson states that a surgeon should have been notified when Ettor Del Guzzo, Jr., arrived at the emergency room with the signs and symptoms of gastorintestinal bleeding. At page 34 of his deposition, Dr. Thompson states that had an appropriate history been taken, again gastrointestinal bleeding would have been apparent.

Dr. Thompson, at Pages 38-39, further states:

> "And none of the appropriate things in terms of his therapy were done. He should have had two IV's put in with a large bore, he should have had whole blood pumped into him, he should have had plasmonate or albumin or some other colloid put into him—
>
> And so this man was literally put on this ward and allowed to bleed to death. Now, it was clear that when he came into the hospital, even though his blood pressure was low and the ambulance attendants recognized he was very sick, it's clear that he was salvageable at that time—since there was no physician there, obviously it was the nurses' responsibility to find out how to access this man's degree of illness and to make a judgment as to whether they needed to call in a physician to see him. In a situation like this in a community hospital where they have no house staff present in the hospital on the ward all the time, that falls to the nurse to make those kinds of judgments."

At page 68 of his deposition, Dr. Thompson was asked:

> "Would you say that if the general surgeon had been called at 2:00 o'clock that Mr. Del Guzzo was

capable of being appropriately managed and been able to survive?

His reply was:

"If all the other facilities needed to take care of him had, in fact, been intact, in other words, if there had been adequate blood in the hospital, adequate catheters to give the blood, adequate monitoring, adequate nursing care and so forth. Presuming that he were in an adequate hospital at the time, I think that up to 2:00 o'clock, he probably could have been salvaged."

Further, at Page 75 of his deposition, Dr. Thompson states:

"—the major problem here was that until 1:30, the nurses didn't recognize and Dr. Williams didn't transmit the fact that this man was about to die."

At page 56 of his deposition, Dr. Williams states that it is the responsibility of the attending nurses to report the condition of the patient to physicians.

At page 19 of her deposition, Nurse Chase states that it is a general rule that if a patient in the emergency room is in need of emergency care, the emergency room physician will render the care. At page 31, Nurse Chase states that it is the nurse's duty to call the family physician from the emergency room and that it was she who decided not to call Dr. Lancione.

It was the inaction or failure to act on the part of the nurses and staff of the Defendant, The City Hospital of Bellaire, which we find to fall below the generally accepted standard of care.

The conduct of the nurses and staff of the Defendant, The City Hospital of Bellaire, demonstrates a failure to

discern the very real seriousness of the condition of Ettor Del Guzzo, Jr., from the time he was first brought into the emergency room until approximately 1:35 o'clock A.M. the next morning.

Dr. Peter Lancione testified that the bloody stools were indicative of gastrointestinal bleeding and that had he attempted to stop the bleeding earlier without success he would have called a surgeon at that time.

Dr. Francis Sunseri testified that in his experience, never had a patient with bleeding ulcers bled to death. Dr. Lancione testified that when surgery was performed, it revealed that Ettor Del Guzzo, Jr., had an ulcer approximately the size of a five-cent piece which has perforated and that it was hemorrhaging.

As to damages, Dr. John F. Burke, Jr., an economist and consultant testified that the average base income that his calculations were based on was Twenty-Seven Thousand Dollars ($27,000.00) per year. Ettor Del Guzzo, Jr., was forty-six (46) years old and had a life expectancy of seventy-three (73) years but because of his personal habits, Dr. Burke stated the expectancy should be reduced to two (2) years, thus leaving an adjusted life expectancy of twenty-five (25) years. Multiplying the adjusted life expectancy of twenty-five (25) years by the average base annual income of Twenty-Seven Thousand Dollars ($27,000.00), Ettor Del Guzzo, Jr., would have earned Six Hundred Seventy-Five Thousand Dollars ($675,000.00) without taking into consideration any increase in the average base income or investment factor.

We, therefore, find in favor of the Plaintiff and against the Defendant, The City Hospital of Bellaire, and assess damages in the amount of Six Hundred Seventy-Five Thousand Dollars ($675,000.00) to the Plaintiff, Nancy Del Guzzo, Executrix of the Estate of Ettor Del Guzzo, Jr.

Respectfully submitted,

/s/ Peter S. Olivito
PETER S. OLIVITO, Arbitrator
Suite 606-612
Sinclair Building
Steubenville, Ohio 43952
Telephone: (614) 283-3341

/s/ Rodney H. Hanson
RODNEY D. HANSON, Arbitrator
320 Howard Street
Bridgeport, Ohio 43912
Telephone: (614) 283-3341

PROOF OF SERVICE

The undersigned hereby certify that true copies of the foregoing Finding of Fact were served upon the following by ordinary United States Mail, postage prepaid, on this 2nd day of August, 1984.

JOHN G. LANCIONE, Esquire
1500 National City Bank Building
Cleveland, Ohio 44114

RICHARD LANCIONE, Esquire
101 The Professional Complex
P.O. Box 0
Bellaire, Ohio 43906

TED S. COOPER, Esquire
Hayes, Cooper, Campbell and Prest
P.O. Box 819
Steubenville, Ohio 43952

GAYLE E. ARNOLD, Esquire
1559 Broad Street
Columbus, Ohio 43215

/s/ Peter S. Olivito
PETER S. OLIVITO, Arbitrator

/s/ Rodney D. Hanson
RODNEY D. HANSON, Arbitrator

IN THE COURT OF COMMON PLEAS
BELMONT COUNTY, OHIO

Case No: 80-CIV-134

NANCY DELGUZZO, EXECUTRIX,
Plaintiff,

vs.

JOSEPH L. MCWILLIAMS, M.D., *et al.*,
Defendants.

DISSENTING OPINION

Because I disagree in a number of material respects with the findings of fact made by the majority of the arbitration panel as set forth in their Finding of Fact, I must respectfully dissent from that opinion. For the reasons set forth herein, I find in favor of the Defendant, The City Hospital of Bellaire, and against the Plaintiff on the Complaint herein. It is my decision, based upon the evidence presented and the law of Ohio that the agents and employees of The City Hospital of Bellaire complied with accepted standards of professional care for nurses in the circumstances presented. Therefore, I recommend that final judgment be entered in favor of Defendant, The City Hospital of Bellaire.

The analysis of this case presented in the majority opinion fails in at least two respects. First, the finding that conduct of Defendant's nurses fell below accepted standards of professional care in failing to notify certain physicians of Mr. Delguzzo's condition is based upon an erroneous interpretation of the facts presented in evidence. Secondly, the finding that any such delay was a proximate cause of Mr. Delguzzo's death was based

not only upon an erroneous interpretation of the facts in evidence, but also ignores the law of Ohio.

The total focus of the majority opinion, and the sole issue as identified by Plaintiff, is the lack of a telephone call to Dr. Lancione at the time Mr. Delguzzo first appeared in the emergency room of The City Hospital of Bellaire on November 19, 1979. However, the most enlightening and critical evidence regarding that issue is the testimony of Nurse Eleanor Chase and Dr. Joseph Williams. These two were present at the time of Mr. Delguzzo's first visit, and their uncontroverted explanations of the sequence of events is determinative of this issue.

Both Dr. Williams and Nurse Chase consistently testified that when Mr. Delguzzo first presented at the emergency room at approximately 4:00 p.m. there were a number of other patients being treated at that time in the emergency room. Nurse Chase talked to the emergency squad personnel and checked Mr. Delguzzo's vital signs. Since he appeared stable, she left the emergency room to take a heart attack patient to the intensive care unit. During the time she was involved in transporting this heart attack patient, Mr. Delguzzo was seen in the emergency room by Dr. Williams. As a result of that examination, Dr. Williams determined that he would not admit Dr. Delguzzo as a patient in the hospital. This examination and consultation with Dr. Williams was completed before Nurse Chase had an opportunity to take any history from the patient or contact the family physician, Dr. Lancione. In fact, she did not even know the identity of the family physician until Mr. Delguzzo was getting ready to leave the emergency room. Shortly after Mr. Delguzzo left, Dr. Lancione called the emergency room and discussed Mr. Delguzzo's condition directly with Dr. Williams. At that time, Dr. Lancione had no discussion whatsoever with Nurse Chase. Dr. Williams informed Dr. Lancione that Mr. Delguzzo had

been sent home and was not admitted. There was no complaint, challenge, question or other contrary comment expressed by Dr. Lancione to Dr. Williams at that time regarding this decision. Nurse Chase was aware of this telephone conversation between Dr. Lancione and Dr. Williams. Nurse Chase did not call Mr. Delguzzo's family physician, as per hospital policy, solely because of the action taken by Dr. Williams and the ensuing telephone conversation between Dr. Williams and Dr. Lancione. There simply is no merit whatsoever to the argument now, with the benefit of hindsight, that a telephone call to Dr. Lancione at the time Mr. Delguzzo was physically present in the emergency room would have resulted in his being admitted to the hospital. Despite the fact that Dr. Lancione gave such testimony, even he also admitted that this was "speculation with the benefit of hindsight". Such speculation is not appropriate evidence. Moreover, this speculation by Dr. Lancione is further magnified upon consideration of his bias as a relative of Mr. Delguzzo and Plaintiff's attorney. Additionally, it is apparent from the evidence that Mr. Delguzzo was an independent, strong-willed individual who wanted to return home rather than be admitted to the hospital on this occasion.

Dr. Lancione's "speculation" that he would have admitted Mr. Delguzzo as a patient is further undermined by the fact that, after his telephone conversation with Dr. Williams, Dr. Lancione made no other efforts to contact Mr. Delguzzo, and instead went out for a social engagement that evening without notifying the hospital or Mr. Delguzzo's family where he could be located in case of any emergency.

Later in the same evening when Mr. Delguzzo returned to the emergency room, Nurse Chase made a number of attempts to contact Dr. Lancione through the telephone numbers provided. After a number of unsuccessful efforts, the family advised her that she should attempt to

contact Dr. Anetalis. She was successful in reaching him and, after a telephone conference between Dr. Anetalis and Dr. Williams, Mr. Delguzzo was admitted as a patient in the step-down unit.

Again, it is critical to analyze the testimony of Dr. Williams, which the majority opinion chooses to ignore. It is clear from his testimony that Dr. Williams was advised that Dr. Anetalis would personally come to the hospital later that evening to check on Mr. Delguzzo's condition. This information was relayed by Dr. Williams to Nurse Chase and, through Nurse Chase, to the other hospital nurses on the floor where Mr. Delguzzo was admitted. The failure of Dr. Anetalis to respond in a timely manner and come to the hospital to see Mr. Delguzzo is not a matter for which the Defendant Hospital can be held liable. The nursing staff of the hospital had been informed, through Dr. Williams, after his phone conversation with Dr. Anetalis, to expect Dr. Anetalis at the hospital sometime later that evening so see Mr. Delguzzo. The evidence is clear throughout this case that later in the night when Mr. Delguzzo's family and friend became anxious because no doctor had yet been to the floor to see Mr. Delguzzo the nursing staff consistently relied upon the representation made earlier that Dr. Anetalis would be there. This was appropriate and acceptable conduct by the nursing staff, particularly in light of the fact that Mr. Delguzzo's condition remained relatively stable through the night into the early morning hours of November 18th.

Perhaps the most significant aspect of this case, which has been totally overlooked by the majority opinion, is the incident which caused Mr. Delguzzo's condition to take a drastic turn for the worse. The hospital records indicate that at 1:30 a.m. on November 18th, Dr. Anetalis was called regarding Mr. Delguzzo's condition. At that time, he ordered an intramuscular injection of Mepergan 50/50. This was manifestly inappropriate medication for

Mr. Delguzzo, who had a compromised ability to maintain blood pressure and a depleted blood volume. In response to the administration of this inappropriate medication, Mr. Delguzzo deteriorated abuptly, leading to his death. Had this medication not been ordered, Mr. Delguzzo's condition would not have deteriorated either so significantly or so rapidly. It was completely inappropriate for Dr. Anetalis to order this medication without full knowledge of the history of Mr. Delguzzo's illness at the time, and without having seen him, but there can be no liability attached to the hospital for following this physician's orders. Specifically, Dr. Douglas Rund testified that giving this medication was contraindicated, and that Mr. Delguzzo's condition deteriorated as a direct result of that injection. Likewise, Dr. Francis Sunseri testified that the Mepergan injection ordered by Dr. Anetalis was inappropriate.

Both Dr. Rund and Dr. Sunseri testified that the hospital nursing personnel exercised appropriate care and skill in rendering care to Mr. Delguzzo. Further, both of those physicians also testified that Mr. Delguzzo's release from the emergency room on his first visit there shortly after 4:00 p.m. was *not* a proximate cause of his death. Finally, both of those physicians also testified that Dr. Anetalis' order for an injection of Mepergan was inappropriate, and was a direct cause of the abrupt deterioration of Mr. Delguzzo's condition, leading to his death.

The crux of Plaintiff's complaint against the hospital is that nurses' failure to timely notify Dr. Lancione adversely affected Mr. Delguzzo's chances of survival. The form of this allegation has been specifically addressed and rejected by the Supreme Court of Ohio in *Cooper v. Sisters of Charity*, 27 Ohio St. 2d 242 (1971). In *Cooper, supra*, the Supreme Court carefully distinguished between the concepts of *causing injury* and merely increasing the risk of harm. The Court rejected the tests of "chance

of recovery" or "substantial possibility of survival", and determined that only in the event an injury was the probable result of the defendant's negligence would liability arise. Of particular import to the instant case was the specific holding in *Cooper*, wherein the Court stated:

> In an action for wrongful death, where medical malpractice is alleged as the proximate cause of death, and plaintiff's evidence indicates that a failure to diagnose the injury *prevented the patient from an opportunity to be operated on, which failure eliminated any chance of the patient's survival*, the issue of proximate cause can be submitted to a jury only if there is sufficient evidence showing that with proper diagnosis, treatment and surgery the patient probably would have survived. (Emphasis added).

Cooper, supra, syllabus.

The holding in *Cooper, supra*, indicates that as a condition precedent to a cause of action based upon a failure to receive treatment or surgery due to a nurse's lack of communication to a physician in order for that physician to render treatment, the nurse's failure to act must have ". . . *eliminated any chance of the patient's survival*". As applied to the facts in the instant case, *Cooper* indicates that Plaintiff is unable to sustain a prima facie case of medical malpractice against the Defendant. Even if it is assumed that Nurse Chase was negligent in not calling Dr. Lancione and/or that nurses in the hospital step-down unit were negligent in not calling Dr. Anetalis prior to 1:30 a.m., the evidence is nevertheless clear that those actions alone had not *eliminated* any chance of Mr. Delguzzo's survival. The facts in evidence clearly indicate that Dr. Williams' conduct intervened during Mr. Delguzzo's first visit to the emergency room and cut off any liability that might otherwise be attributed to Nurse Chase for not calling Dr. Lancione at that time.

Further, the evidence is clear that Dr. Anetalis' failure to appear at the hospital, as he advised he would, throughout the night of November 17th, and his later inappropriate order for Mepergan, cut off any liability that might otherwise be found against the nurses in the step-down unit. Since the threshold requirement of *Cooper, supra*, is not met, any effect which this Defendant's nurses' conduct may have had on Mr. Delguzzo's chance of survival was not, as a matter of law, the proximate cause of his death.

The majority opinion has failed to analyze and weigh all of the evidence presented. That opinion also has misunderstandings and mischaracterizations of facts presented in evidence that lead to erroneous conclusions. Finally, the majority seeks to hold the hospital liable in this case for acts and omissions by Dr. Williams, Dr. Lancione and Dr. Anetalis, which is totally inappropriate and completely unsupported by the evidence.

It is the recommendation of this arbitrator that final judgment be rendered in favor of Defendant, The City Hospital of Bellaire, in all respects.

Respectfully submitted,

LANE, ALTON & HORST
155 East Broad Street
Columbus, OH 43215
Phone: (614) 228-6885

By /s/ Gayle E. Arnold
GAYLE E. ARNOLD

IN THE COURT OF APPEALS
BELMONT COUNTY, OHIO
SEVENTH APPELLATE DISTRICT

Court of Appeals Case No. 85-B-33

NANCY DEL GUZZO, EXECUTRIX,
Plaintiff-Appellee,

vs.

THE CITY HOSPITAL OF BELLAIRE,
Defendant-Appellant.

NOTICE OF APPEAL TO THE OHIO SUPREME COURT

Notice of appeal to the Ohio Supreme Court is hereby given by Appellant The City Hospital of Bellaire from the judgment of the Court of Appeals for the Seventh Appellate District, entered by Journal Entry on October 23, 1985. The case involves a substantial constitutional question and is of great public and general interest.

/s/ Gerald P. Duff
GERALD P. DUFF, of the firm
HANLON, DUFF & PALEUDIS,
Co., LPA
46770 National Road West
St. Clairsville, Ohio 43950
Telephone: (614) 695-1444
Attorney for Appellant
The City Hospital of Bellaire

[Filed Nov. 21, 1985]

PROOF OF SERVICE

Service of the foregoing Notice of Appeal was had by mailing a copy of the same this 21st day of November, 1985 to Richard L. Lancione, Esq., Professional Complex, Bellaire, Ohio, 43906; and to John G. Lancione, Esq., 1500 National City Bank Building, 629 Euclid Avenue, Cleveland, Ohio, 44114-3062.

/s/ Gerald P. Duff
GERALD P. DUFF

IN THE SUPREME COURT OF OHIO

Case No. 85-1801

NANCY DELGUZZO, EXECUTRIX, ETC.,
Plaintiff-Appellee,

vs.

THE CITY HOSPITAL OF BELLAIRE,
Defendant-Appellant.

[Filed Nov. 21, 1985]

On Appeal from the Court of Appeals of
Belmont County, Ohio
Seventh Appellate District

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT THE CITY HOSPITAL OF BELLAIRE

Richard L. Lancione, Esq.
Professional Complex
Bellaire, Ohio 43906
Telephone: (614) 676-2034

and

John G. Lancione, Esq.
Spangenberg, Shibley, Traci & Lancione
1500 National City Bank Bldg.
Cleveland, Ohio 44114
Telephone: (216) 696-3232
Attorneys for Appellee
Nancy DelGuzzo.

Gerald P. Duff, of the firm
HANLON, DUFF & PALEUDIS CO., LPA
46770 National Road West
St. Clairsville, Ohio 43950
Telephone: (614) 695-1444
Attorney for Appellant, The City Hospital of Bellaire

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Authorities cited in support of Proposition of Law No. 1:	
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Page

TIME PRESCRIBED FOR FILING, THE ORIGINAL OF WHICH WAS MAILED BUT NOT RECEIVED AND FILED BY THE CLERK.

Authorities cited in support of Proposition of Law No. 2:

Dudukovich v. *Housing Authority* (1979), 58 Ohio St. 2d 202 12

Roseman v. *Reminderville* (1984), 14 Ohio App. 3d 124 12

Richards v. *Industrial Commission* (1955), 163 Ohio St. 439 ..... 12, 13

Capital Loan & Savings Co. v. *Biery* (1938), 134 Ohio St. 333 13

Commonwealth Oil Co. v. *Turk* (1928), 118 Ohio St. 273 13

Castleberry v. *Evatt* (1946), 147 Ohio St. 30 ..... 13, 15

In Re: Guardianship of Wisner (1947), 148 Ohio St. 31.. 14

McDowell v. *Hannefeld* (1950), 87 Ohio App. 407 15

Moore v. *Foreacher* (1951), 91 Ohio App. 28 15

Couk v. *Ocean Accident & Guar. Corp., Ltd.* (1941), 138 Ohio St. 110 15

Mosey v. *Hiestand* (1941), 138 Ohio St. 248 ..... 15, 16

United States v. *Merrick* (W.D. Mo. 1963), 223 F. Supp. 908 16

Thomas v. *United States* (C.A. 9, 19564), 328 F.2d 607.. 16

Maritime v. *Marina* (1982), 70 Ohio St. 2d 257 ..... 16, 17

PROPOSITION OF LAW NO. 3:

SINCE THE APPELLEE RECEIVED A COPY OF THE MAILED, BUT PURPORTEDLY UNFILED, NOTICE OF APPEAL, AND THE TIMELY FILED REQUEST FOR PREPARATION OF THE TRANSCRIPT FOR APPEAL PURPOSES, TO DENY APPELLANT'S APPEAL HEREIN WOULD CONSTITUTE A DENIAL OF DUE PROCESS OF LAW AND AN UNCONSTITUTIONAL GLORIFICATION OF FORM OVER SUBSTANCE. THE COURT OF APPEALS' DISMISSAL SHOULD BE REVERSED.

PROPOSITION OF LAW NO. 3

SINCE THE APPELLEE RECEIVED A COPY OF THE MAILED, BUT PURPORTEDLY UNFILED, NOTICE OF APPEAL, AND THE TIMELY FIELD REQUEST FOR PREPARATION OF THE TRANSCRIPT FOR APPEAL PURPOSES, TO DENY APPELLANT'S APPEAL HEREIN WOULD CONSTITUTE A DENIAL OF DUE PROCESS OF LAW AND AN UNCONSTITUTIONAL GLORIFICATION OF FORM OVER SUBSTANCE. THE COURT OF APPEALS' DISMISSAL SHOULD BE REVERSED.

The Fourteenth Amendment to the United States Constitution states, in part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Similarly, the Constitution of the State of Ohio also sets forth due process of law guarantees. Article I, Section 16, of the Ohio Constitution provides that:

> "All courts shall be open, and every person for an injury done him and his land, goods, persons, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

The Constitutional guarantees of due process of law and equal protection of law found in the Fourteenth Amendment to the U.S. Constitution and in various sections of the Ohio Constitution, including Section 16, Article I, have been held by the Supreme Court of Ohio to be "substantially equivalent". *State, ex. rel. Heller* v. *Miller* (1980), 61 Ohio St. 2d 6, 8.

At the outset, it is beyond question that the word "person" as used in the Fourteenth Amendment, includes corporations, at least insofar as it prohibits a state from depriving them of property without due process of law. *Covington & Lexington Turnpike Rd. Co.* v. *Sandford*

(1896), 41 L. Ed. 560. It is also not subject to question that the word "State" as used in the Fourteenth Amendment includes instrumentalities and agencies of a * * *.

* * * *

STATEMENT IN SUPPORT OF JURISDICTION

It can be seen therefore that the original Notice of Appeal was clearly mailed well within rule. The Notice of Appeal mailed on August 30, 1985, to the Clerk, a distance of approximately 35 miles, should be presumed timely received in the ordinary course of mails within the time prescribed for filing the Notice of Appeal on September 11, 1985. Further, the filing of the Request for Transcript with the trial court creates a presumption that the Notice of Appeal was filed.

The primary objective of a Notice of Appeal is to make it known that an appeal is being taken. Nothing more than such notice is required to vest jurisdiction of the cause in the Court of Appeals. The principle function of a Notice of Appeal is to advise the opposite party of the taking of an appeal. In light of the general concept that statutes relating to appeals are remedial and should be liberally construed to the end that the right of appeal may not be defeated, Appellant's actions herein should be construed to such end. The opposite party received a copy of the Notice of Appeal well within the time for filing. The opposite party further received a copy of the Request for Transcript well within the time for filing of the Notice of Appeal. The Request for Transcript contained enough information to apprise the opposite party of the particular judgment which was sought to be reviewed, so as to constitute sufficient notice of appeal.

It is respectfully submitted that the Court of Appeal's *sua sponte* dismissal, under this statement of facts, is patently unfair, and is not in keeping with the spirit of the Rules of Civil Procedure.

The United States and Ohio Constitutions mandate that The City Hospital be afforded due process of law in proceedings before the Courts of the State of Ohio. Due process of law has not been afforded in the proceedings below. The City Hospital has been denied an opportunity to have the underlying cause of action heard on its merits. This is so only because the Clerk of Courts purportedly never received the August 30, 1985, Notice of Appeal, although both attorneys for the opposite party received the Notice well within rule.

The effect of the Court of Appeals decision is to preclude The City Hospital the opportunity to present evidence to a jury. The City Hospital has therefore been deprived of a significant right without ever having had the opportunity for a trial by a jury before such deprivation. This is precisely the type of conduct which the due process clause of the Fourteenth Amendment to the United States Constitution was aimed at prohibiting. There is also the question of offsetting the amounts of the covenants not to sue. The Appellant has these and other important errors to be decided in the appeal before the Court of Appeals.

For the foregoing reasons, this case is of public or great general interest, and would deprive litigants throughout Ohio of substantial constitutional guarantees. As demonstrated by the previously cited quotations in *Foman* v. *Davis*, *supra*, and the previously cited decisions of this Honorable Court, it is respectfully submitted that leave to appeal should be granted to further fulfill the main objective of justice that cases should be decided on their merits, rather than upon procedural niceties and technicalities. In granting leave to appeal in this case, the result will cause just results to be reached in not only this case but many future cases with the same or similar issues. For the foregoing reasons, Appellant The City Hospital requests that this Court reverse the deci-

sion of the Court of Appeals and allow the appeal to be heard on its merits.

Respectfully submitted,

/s/ Gerald P. Duff
GERALD P. DUFF, of the firm
HANLON, DUFF &
PALEUDIS CO., LPA
46770 National Road West
St. Clairsville, Ohio 43950
Telephone: (614) 695-1444
Attorney for Defendant-
Appellant,
The City Hospital

IN THE COURT OF COMMON PLEAS
OF BELMONT COUNTY, OHIO

Case No. 80-CIV-134

NANCY DELGUZZO, EXECUTRIX, ETC.,
Plaintiff

—vs—

JOSEPH L. WILLIAMS, M.D., *et al.*,

and

CITY HOSPITAL OF BELLAIRE,
Defendant-Appellant

NOTICE OF APPEAL
WITH MEMORANDUM IN SUPPORT

Notice is hereby given that City Hospital of Bellaire, Defendant, hereby appeals to the Court of Appeals of Belmont County, Ohio, Seventh Appellate District, from the order overruling Defendant's Motion to Vacate and Motion to Amend Pleadings entered in this action on the 12th day of August, 1985.

In addition, the Defendant, City Hospital of Bellaire, now moves this Court for an order finding its appeal herein to be timely filed and for the appeal to be heard on its merits for the reason set forth in the Memorandum in Support attached hereto and incorporated herein.

Respectfully submitted,
HAYES, COOPER,
CAMPBELL & PREST

By: /s/ Ted S. Cooper
TED S. COOPER
Attorney for Defendant,
City Hospital of Bellaire
421 Market Street
P.O. Box 819
Steubenville, Ohio 43952
Phone: (614) 283-3711

[Filed Sep. 30, 1985]

September 26, 1985

Mr. Randall Marple
Clerk of Courts
Belmont County Common
Pleas Court
Belmont County Courthouse
St. Clairsville, Ohio 43950

Re: DelGuzzo vs. Williams, et al.
Case No. 80-CIV-134

Dear Mr. Marple:

Enclosed please find an original and four copies of Defendant's Notice of Appeal in the above-captioned case. Please return at least one time-stamped copy to us in the envelope provided. Thank you for your cooperation.

Very truly yours,

HAYES, COOPER, CAMPBELL & PREST

By:
MICHAEL J. CALABRIA

MJC/pf

Enclosures

AFFIDAVIT

STATE OF)
) ss:
COUNTY OF)

John G. Lancione, being first duly sworn and cautioned, says as follows:

1. Affiant is an attorney in Cleveland, Ohio representing the Plaintiff in the litigation captioned Nancy DelGuzzo, Executrix, etc. v. Joseph Williams, M.D., et al., being case no. 80-CIV-134 in the Belmont County Court of Common Pleas.

2. Affiant states he received a copy of the Notice of Appeal on behalf of The City Hospital of Bellaire by ordinary mail during the first week in September, 1985.

Further, Affiant sayeth naught.

/s/ John G. Lancione
JOHN G. LANCIONE

SWORN to before me and subscribed in my presence this 8th day of October, 1985,

/s/ Cheryl M. Mackson
Notary Public

AFFIDAVIT

STATE OF)
) ss:
COUNTY OF)

Richard L. Lancione, being first duly sworn and cautioned, says as follows:

1. Affiant is an attorney in Bellaire, Ohio representing the Plaintiff in the litigation captioned Nancy DelGuzzo, Executrix, etc. v. Joseph Williams, M.D., et al., being case no. 80-CIV-134 in the Belmont County Court of Common Pleas.

2. Affiant states he received a copy of the Notice of Appeal on behalf of The City Hospital of Bellaire by ordinary mail on or about September 4, 1985.

Further, Affiant sayeth naught.

/s/ Richard L. Lancione
RICHARD L. LANCIONE

SWORN to before me and subscribed in my presence this 3rd day of October, 1985.

/s/ Theresa E. Huffman
Notary Public

My Commission Expires: Feb. 24, 1989

[SEAL]

IN THE COURT OF COMMON PLEAS
OF BELMONT COUNTY, OHIO

Case No. 80-CIV-134

NANCY DELGUZZO, EXECUTRIX, ETC.,
Plaintiff

—VS—

JOSEPH WILLIAMS, M.D., *et al.*,

and

CITY HOSPITAL OF BELLAIRE,
Defendant-Appellant

REQUEST FOR TRANSCRIPT OF PROCEEDINGS

TO: Court Reporter Alice Reilly:

Please transcribe the proceedings in the above-captioned case conducted before Judge Charles Knapp on February 5, 1985. Please deliver the transcript to the Belmont Clerk of Courts for inclusion in the record on appeal of this matter.

Respectfully submitted,

HAYES, COOPER,
CAMPBELL & PREST

By: /s/ Michael J. Calabria
MICHAEL J. CALABRIA
Attorney for Defendant,
City Hospital of Bellaire
421 Market Street
P.O. Box 819
Steubenville, Ohio 43952
Phone: (614) 283-3711

[Filed Sept. 6, 1985]

PROOF OF SERVICE

A COPY of the foregoing Request for Transcript of Proceedings has been served upon the Plaintiff by placing same in the U.S. Mail, postage prepaid, and addressed as follows, all on this 5th day of September, 1985:

1. Mr. John G. Lancione
   Attorney for Plaintiff
   1500 National City Bank Bldg.
   Cleveland, Ohio 44114

2. Mr. Richard L. Lancione
   Attorney for Plaintiff
   Professional Complex
   Bellaire, Ohio 43906

/s/ Michael J. Calabria
MICHAEL J. CALABRIA
Attorney for Defendant,
City Hospital of Bellaire

HAYES, COOPER, CAMPBELL & PREST
Attorneys at Law
421 Market Street
P.O. Box 819
Steubenville, Ohio 43952

September 5, 1985

Mr. Randy L. Marple
Clerk of Court
BELMONT COUNTY COMMON
PLEAS COURT
Belmont County Court
House
St. Clairsville, Ohio 43950

Re: Nancy DelGuzzo, Executrix, etc. vs.
Dr. Joseph L. Williams, et al.
Case No. 80-CIV-134

Dear Mr. Marple:

Enclosed please find an original and four copies of a Request for Transcript of Proceedings, which we have prepared on behalf of the Defendant, City Hospital of Bellaire. Would you please file the same, returning one of the copies, time-stamped, to our office in the envelope provided. Thank you for your cooperation.

Very truly yours,

HAYES, COOPER,
CAMPBELL & PREST

By: /s/ Michael J. Calabria
MICHAEL J. CALABRIA

[Filed Sep. 6, 1985]

MJC/mm

Enclosures

IN THE COURT OF COMMON PLEAS
OF BELMONT COUNTY, OHIO

Case No. 80-CIV-134

NANCY DELGUZZO, EXECUTRIX, ETC.,
Plaintiff

—vs—

JOSEPH L. WILLIAMS, *et al.*,

and

CITY HOSPITAL OF BELLAIRE,
Defendant-Appellant

NOTICE OF APPEAL

Notice is hereby given that City Hospital of Bellaire, Defendant, hereby appeals to the Court of Appeals of Belmont County, Ohio, Seventh Appellate District, from the order overruling Defendant's Motion to Vacate and Motion to Amend Pleadings entered in this action on the 12th day of August, 1985.

Respectfully submitted

HAYES, COOPER, CAMPBELL &
PREST

By: /s/ Ted S. Cooper
TED S. COOPER
Attorney for Defendant,
City Hospital of Bellaire
421 Market Street
P.O. Box 819
Steubenville, Ohio 43952
Phone: (614) 283-3711

PROOF OF SERVICE

A COPY of the foregoing Notice of Appeal has been served upon the Plaintiff by placing same in the U.S. Mail, postage prepaid, and addressed as follows, all on this 30th day of August, 1985:

1. Mr. John G. Lancione
   Attorney for Plaintiff
   1500 National City Bank Bldg.
   Cleveland, Ohio 44114

2. Mr. Richard L. Lancione
   Attorney for Plaintiff
   Professional Complex
   Bellaire, Ohio 43906

/s/ Ted S. Cooper
TED S. COOPER
Attorney for Defendant,
City Hospital of Bellaire

August 30, 1985

Mr. Randy L. Marple
Clerk of Court
BELMONT COUNTY COMMON
PLEAS COURT
Belmont County Court
House
St. Clairsville, Ohio 43950

Re: Nancy DelGuzzo, Executrix, etc. vs.
Dr. Joseph L. Williams, et al.
Case No. 80-CIV-134

Dear Mr. Marple:

Enclosed please find an original and four copies of a Notice of Appeal, which we have prepared on behalf of the Defendant, City Hospital of Bellaire. Would you please file the same, returning one of the copies, time-stamped, to our office in the envelope provided. Thank you for your cooperation.

Very truly yours,

HAYES, COOPER, CAMPBELL &
PREST

By:
TED S. COOPER

TSC/mm

Enclosures

AFFIDAVIT

STATE OF OHIO)
) ss:
COUNTY OF JEFFERSON)

Now comes Michael J. Calabria and, being first duly sworn and cautioned, says as follows:

1. Affiant is an attorney, with offices in Steubenville, Ohio, and along with Ted S. Cooper, represents the Defendant, City Hospital of Bellaire;

2. That on August 12, 1985, the Court of Common Pleas of Belmont County filed a judgment entry overruling Defendant's Motion to Vacate and Motion to Amend Pleadings.

3. Affiant states on August 30, 1985 he prepared a Notice of Appeal for filing in the case of Nancy DelGuzzo, Executrix, etc. v. Joseph Williams, M.D., et al. pending in Belmont County Court of Common Pleas;

4. That said notice was signed in his presence by Ted S. Cooper and the original plus copies, placed in an envelope addressed to Randall Marple, Clerk of Court, Belmont County Courthouse, St. Clairsville, Ohio 43950. Said envelope, being first class mail and postage prepaid, was placed in the United States mail service in the afternoon of August 30, 1985. Copies of the Notice of Appeal were also mailed that afternoon to plaintiff's counsel, Richard L. Lancione in Bellaire, Ohio and John G. Lancione, in Cleveland, Ohio.

5. That the Notice of Appeal as addressed was not returned by United States Postal Service;

6. That both plaintiff's counsel acknowledge receipt of the Notice of Appeal during the first week of September;

7. That a subsequent Request for Transcript was likewise addressed and mailed September 5, 1985 and time-

stamped by the Clerk of Courts on September 6, 1985, returned to counsel September 13, 1985.

8. That on September 23, 1985, Affiant was notified by plaintiff's counsel that in preparing for the appeal it came to their attention that the Clerk of Courts did not have an appellate file for this case;

Further Affiant sayeth naught.

/s/ Michael J. Calabria
MICHAEL J. CALABRIA

SWORN to before me and signed in my presence this 25th day of September, 1985.

/s/ Patricia L. Freeman
Notary Public

My Commission expires:

IN THE COURT OF COMMON PLEAS
OF BELMONT COUNTY, OHIO

Case No. 8-CIV-134

NANCY DELGUZZO, EXECUTRIX, ETC.,
Plaintiff

—VS—

JOSEPH L. WILLLIAMS, M.D., *et al.*,
Defendants

MOTION TO VACATE

Now comes the Defendant, City Hospital of Bellaire, and based upon the inherent common law power of this court; or, alternatively, Rule 60(B) of the Ohio Rules of Civil Procedure, moves this court for an order vacating the judgment entered March 22, 1985 on the basis that said judgment is void. Defendant states this court had no power to award and journalize the judgment under the proceedings set forth in Section 2711.21, Ohio Revised Code, as more fully supported in the Memorandum attached hereto.

Alternatively, Defendant moves this court for an order nunc pro tunc to correct the judgment entered March 22, 1985 for the reasons set forth in said Memorandum.

Respectfully submitted,

HAYES, COOPER,
CAMPBELL & PREST

By: /s/ Michael J. Calabria
MICHAEL J. CALABRIA
Attorney for City Hospital
of Bellaire
421 Market Street
P.O. Box 819
Steubenville, Ohio 43952
Phone: (614) 238-3711

[Filed Apr. 18, 1985]

PROOF OF SERVICE

A COPY of the foregoing Motion to Vacate has been served upon the Plaintiff by placing same in the U.S. Mail, postage prepaid, and addressed as follows, all on this 18th day of April, 1985:

1. Mr. John G. Lancione
   Attorney for Plaintiff
   1500 National City Bank Bldg.
   Cleveland, Ohio 44114
2. Mr. Richard L. Lancione
   Attorney for Plaintiff
   Professional Complex
   Bellaire, Ohio 43906

/s/ Michael J. Calabria
MICHAEL J. CALABRIA
Attorney for Defendant, City Hospital of Bellaire

IN THE COURT OF COMMON PLEAS
OF BELMONT COUNTY, OHIO

Case No. 80-CIV-134

NANCY DELGUZZO, EXECUTRIX, *et al.*,
Plaintiff

—VS—

JOSEPH L. WILLIAMS, M.D., *et al.*,
Defendants

MOTION TO AMEND PLEADINGS AND FOR TRIAL DATE

Now comes the Defendant, City Hospital of Bellaire, and hereby gives notice that it rejects the arbitrators' award as determined by this court in its decision of March 22, 1985.

WHEREFORE, Defendant moves this court for an order to amend pleadings in accordance with Section 2711.21 of the Ohio Revised Code and for a trial date at which time the issues in this case may be decided by a jury.

In support, Defendant respectfully directs this court's attention to Section 2711.21 (E), Ohio Revised Code, which states in part:

> "(E) Nothing in this section shall be construed to limit the right of any person . . . to be bound by the decision of the arbitrators."

Respectfully submitted,

HAYES, COOPER, CAMPBELL
& PREST

By: /s/ Michael J. Calabria
MICHAEL J. CALABRIA
Attorney for Defendant,
City Hospital of Bellaire
421 Market Street
P.O. Box 819
Steubenville, Ohio 43952
Phone: (614) 283-3711

[Filed Apr. 1, 1985]

PROOF OF SERVICE

A COPY of the foregoing Motion has been served upon the Plaintiff by placing same in the U.S. Mail, postage prepaid, and addressed as follows, all on this 1st day of April, 1985:

1. Mr. John G. Lancione
Attorney for Plaintiff
1500 National City Bank Bldg.
Cleveland, Ohio 44114

2. Mr. Richard L. Lancione
Attorney for Plaintiff
Professional Complex
Bellaire, Ohio 43906

/s/ Michal J. Calabria
MICHAEL J. CALABRIA
Attorney for Defendant,
City Hospital of Bellaire

IN THE COURT OF COMMON PLEAS
OF BELMONT COUNTY, OHIO

Case No. 80-CIV-134

NANCY DEL GUZZO, EXECUTRIX OF THE ESTATE OF
ETTOR DEL GUZZO, JR., DECEASED,
Plaintiff

—VS—

DR. JOSEPH L. WILLIAMS, *et al.*,
Defendants

MOTION TO MODIFY ARBITRATION AWARD

Now comes the Defendant, The City Hospital of Bellaire, and moves this court for an order modifying the arbitration award by deducting therefrom the value of the Covenant previously entered into between the Plaintiff and Defendants, Joseph L. Williams, M.D.; Bellaire Medical Group, Inc.; Angelo J. Antalis, M.D.; Peter Lancione, M.D. and their surety, The Medical Protective Company of Fort Wayne, Indiana.

For cause, Defendant states that said Covenant was given to joint tortfeasors from which this Defendant is entitled to contribution, all as more fully set forth in the Memorandum attached hereto.

Respectfully submitted,

HAYES, COOPER,
CAMPBELL & PREST

By: /s/ Ted S. Cooper
TED S. COOPER
Attorney for Defendant,
The City Hospital of Bellaire
421 Market Street
P.O. Box 819
Steubenville, Ohio 43952
Phone: (614) 283-3711

[Filed Oct. 29, 1984]

PROOF OF SERVICE

A COPY of the foregoing Motion to Modify Arbitration Award, with attached Memorandum in Support, has been served upon the Plaintiff by placing same in the U.S. Mail, postage prepaid, and addressed as follows, all on this 29th day of October, 1984:

1. Mr. John G. Lancione
   Attorney for Plaintiff
   1500 National City Bank Bldg.
   Cleveland, Ohio 44114

2. Mr. Richard L. Lancione
   Attorney for Plaintiff
   Professional Complex
   Bellaire, Ohio 43906

/s/ Ted S. Cooper
TED S. COOPER
Attorney for Defendant,
The City Hospital of Bellaire

IN THE COURT OF COMMON PLEAS
OF BELMONT COUNTY, OHIO

Case No. 80-CIV-134

NANCY DEL GUZZO, EXECUTRIX,
Plaintiff

vs.

DR. JOSEPH L. WILLIAMS, *et al.*,
Defendants

ANSWER OF THE CITY HOSPITAL

Now comes the Defendant, The City Hospital, erroneously named as Bellaire City Hospital, and for answer to the Second Amended Complaint of the Plaintiff says:

FIRST DEFENSE

1. This Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1, 2, 4 and 9.
2. Admits the allegations contained in Paragraph 3.
3. Denies Paragraphs 5, 6, 7, 8 and 10.

SECOND DEFENSE

The Plaintiff's Second Amended Complaint fails to state a claim against this answering Defendant upon which relief may be granted.

THIRD DEFENSE

The Plaintiff's Second Amended Complaint does not state a claim for relief against this answering Defendant upon which punitive damages may be awarded.

FOURTH DEFENSE

The Plaintiff has failed to comply with Ohio Revised Code Section 2307.42.

WHEREFORE, this answering Defendant prays that the Plaintiff's Second Amended Complaint be dismissed, that it have its cost in the defense of this matter and have such further relief as the court may deem just and equitable.

HAYES, COOPER,
CAMPBELL & PREST
421 Market Street
P.O. Box 819
Steubenville, Ohio 43952
Phone: (614) 283-3711

By: /s/ Ted. S. Cooper
TED S. COOPER
Attorney for The City Hospital

CERTIFICATE OF SERVICE

A copy of the foregoing Answer to the Second Amended Complaint was served by placing the same in the United States mail, postage prepaid this 4th day of December, 1980, and addressed to the following:

1. Craig Spangenberg, Esq. and John G. Lancione, Esq.
   SPANGENBERG, SHIBLEY, TRACI AND LANCIONE
   1500 National City Bank Building
   Cleveland, Ohio 44114
   Attorneys for the Plaintiff

2. Marlin J. Harper, Esq.
   KINDER, KINDER & HANLON
   185 West Main Street
   St. Clairsville, Ohio 43950
   Attorney for The Medical Foundation of Bellaire, Inc.

3. Frank J. Micheli, Esq.
   KINCAID, CULTICE, MICHELI & GEYER
   50 North Fourth Street
   P.O. Box 1307
   Zanesville, Ohio 43701
   Attorney for Dr. Joseph L. Williams, Dr. Angelo Antalis and Bellaire Medical Group, Inc.

4. Peter Lancione, M.D.
   3609 Belmont Street
   Bellaire, Ohio 43906
   Third Party Defendant

By: /s/ Ted S. Cooper
TED S. COOPER
Attorney for The City Hospital

IN THE COURT OF COMMON PLEAS
BELMONT COUNTY, OHIO

No. 80-CIV-134

NANCY DEL GUZZO, EXECUTRIX OF THE ESTATE OF ETTOR DEL GUZZO, JR., DECEASED, Dell Knoll Drive, Bellaire, Ohio 43906,

Plaintiff,

vs.

DR. JOSEPH L. WILLIAMS, 3000 GUERNSEY STREET, Bellaire, Ohio 43906

and

THE MEDICAL FOUNDATION OF BELLAIRE, INC., d.b.a The Bellaire Clinic, 3000 Guernsey Street, Bellaire, Ohio 43906

and

BELLAIRE MEDICAL GROUP, INC., 3000 Guernsey Street, Bellaire, Ohio 43906,

Defendants,

and

DR. ANGELO ANTALIS, 3801 Lincoln Avenue, Shadysi[illegible]e, Ohio 43947

and

BELLAIRE CITY HOSPITAL, 4697 Harrison Street, Bellaire, Ohio 43906,

New Parties Defendant.

SECOND AMENDED COMPLAINT

(Jury Trial is Requested)

1. Now comes the plaintiff and says that she is the duly appointed and existing Executrix of the Estate of Ettor Del Guzzo, Jr., deceased, and that she brings this action on behalf of said estate, on her behalf as surviving spouse, and on behalf of the other surviving next of kin for damages in wrongful death and conscious pain and suffering.

2. New Party Defendant, Dr. Angelo Antalis, was the physician responsible for the care and treatment of the decedent from the time of his admission at Bellaire City Hospital on the 17th of November, 1979, through the early morning hours on the 18th of November, 1979.

3. New Party Defendant, Bellaire City Hospital, provides general hospital services through its agents and employees, and the decedent was a patient in said hospital on the 17th and 18th of November, 1979.

4. New Party Defendant, Dr. Angelo Antalis, failed to exercise ordinary care, skill and diligence, such as is customarily exercised by physicians under circumstances such as those existing herein during the time he was the decedent's physician on the 17th and 18th of November, 1979.

5. The New Party Defendant, Bellaire City Hospital, was negligent by and through its duly appointed employees and agents who acted in delivering health care services to the decedent on the 17th and 18th of November, 1979.

6. The defendants herein, Dr. Joseph L. Williams, The Medical Foundation of Bellaire, Inc. and the Bellaire Medical Group, Inc., operated the Emergency Room at Bellaire City Hospital and on November 17, 1979, at about 4:10 p.m., said decedent was presented to the said Emergency Room where his condition was improperly diagnosed and he was discharged.

7. On November 17, 1979, at about 8:00 p.m., the decedent was once again presented to the said Emergency Room whereupon his condition was diagnosed, and he was admitted into the Bellaire City Hospital by the defendant, Dr. Joseph L. Williams.

8. While a patient under the care of the defendants from 8:00 p.m. on November 17, 1979, until 2:10 a.m. on the 18th of November, 1979, he received improper, careless and negligent care by the defendants.

9. The defendant, Dr. Joseph L. Williams, after admitting the said decedent with a diagnosis of intestinal hemorrhage, failed and neglected to follow the patient and abandoned him when he knew that medical care and surgical consultation were necessary to save his life. Such acts represent wanton misconduct and a total failure of care for said patient.

10. As a direct and proximate result of the defendants' joint and several carelessness, negligence and medical malpractice, said decedent came to his premature death on the 18th of November, 1979, causing damages to his estate and surviving next of kin.

WHEREFORE, plaintiff prays damages against the defendants for compensatory and exemplary or punitive damages, all in accordance with existing law, together with all costs of suit and reasonable attorneys' fees.

A TRIAL BY JURY IS HEREBY REQUESTED.

_____

CRAIG SPANGENBERG

_____

JOHN G. LANCIONE

SPANGENBERG, SHIBLEY, TRACI & LANCIONE
1500 National City Bank Building
Cleveland, Ohio 44114
Attorneys for the Plaintiff.

OHIO CONSTITUTION, ARTICLE I, § 5

§ 5 Trial by jury; reform in civil jury system.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. (As amended September 3, 1912).

OHIO CONSTITUTION, ARTICLE I

§ 16 [Redress in courts.]

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

UNITED STATES CONSTITUTION

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion

against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Articles in addition to, and amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the orginal Constitution.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(Effective 1791)

OHIO RULE OF CIVIL PROCEDURE

RULE 38. JURY TRIAL OF RIGHT

(A) Right Preserved. The right to trial by jury shall be preserved to the parties inviolate.

(B) Demand. Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand shall be in writing and may be indorsed upon a pleading of the party. If the demand is indorsed upon a pleading the caption of the pleading shall state "Jury Demand Endorsed Hereon." In an action for appropriation of a right of way brought by a corporation pursuant to Article XIII, Section 5, of the Ohio Constitution, the jury shall be composed of twelve members unless the demand by more than one party in such action the jury shall be composed of the greater number not to exceed twelve. In all other civil actions the jury shall be composed of eight members unless the demand specifies a lesser number; and in the event of timely demand by more than one party in such actions the jury shall be composed of the greater number not to exceed eight.

(C) Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within fourteen days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(D) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

OHIO RULE OF APPELLATE PROCEDURE

RULE 4. APPEAL AS OF RIGHT— WHEN TAKEN

(A) Appeals in Civil Cases. In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed before entry of such judgment or order shall be treated as filed after such entry and on the day thereof. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, which ever period last expires.

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the trial court by any party pursuant to the Civil Rules hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of the last of any of the following orders made upon a timely motion under such rules granting or denying a motion (1) for judgment under Rule 50(B); (2) for a new trial under Rule 59; (3) for vacating or modifying a judgment by objections to a referee's report under Rule 53 (E)(7) or Juv.R. 40(D)(7). A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

OHIO RULE OF APPELLATE PROCEDURE

Rule 3

(C) Content of the notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the appellant added, as appropriate. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

Federal Rule of Appellate Proc.

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party; (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or

granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

OHIO REVISED CODE

§ 2307.32 [Enforcement of contribution; limitation of action; effect of judgment findings by court or jury, release, etc.]

(A) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment debtors by motion upon notice to all parties to the action.

(B) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(C) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either discharged by payment the common liability within the statute of limitations period applicable to the claimant's right of action against him and has commenced his action for contribution within one year after payment, or agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(D) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(E) Valid answers to interrogatories by a jury or findings by a court sitting without a jury in determining

the liability of the several defendants for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

(F) When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms otherwise provide, but it reduces the claim against the other to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater;

(2) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

OHIO REVISED CODE

§ 2711.11 Court may modify award. (GC § 12148-11)

In any of the following cases, the court of common pleas in the county wherein an award was made in an arbitration proceeding shall make an order modifying or correcting the award upon the application of any party to the arbitration if:

(A) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;

(B) The arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

(C) The award is imperfect in matter of form not affecting the merits of the controversy.

The order shall modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

OHIO REVISED CODE

§ 2711.13 [Motion to vacate, modify, or correct an award; service.]

After an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in sections 2711.10 and 2711.11 of the Revised Code.

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion, any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

OHIO REVISED CODE

§ 2711.21 [Arbitration board to hear medical claim.]

(A) Upon the filing of any medical claim as defined in division (D)(3) of section 2305.11 of the Revised Code, the controversy shall be submitted to an arbitration board consisting of three arbitrators to be named by the court. The arbitration board shall consist of one person designated by the plaintiff or plaintiffs, one person designated by the defendant or defendants, and a person designated by the court. The person designated by the court shall serve as the chairman of the board. Each member of the board shall receive a reasonable compensation based on the extent and duration of actual service rendered, and paid in equal proportions by the parties in interest. In a claim accompanied by a poverty affidavit, the cost of the arbitration shall be borne by the court.

(B) The arbitration proceedings shall be conducted in accordance with sections 2711.06 to 2711.16 of the Revised Code insofar as they are applicable. Such proceedings shall be conducted in the county in which the trial is to be held.

(C) If the decision of the arbitration board is not accepted by all parties thereto, the pleadings shall be amended to aver both the fact that the controversy was submitted to an arbitration board and the decision of the arbitration board. The decision of the arbitration board, and any dissenting opinion written by any board member, shall be admitted into evidence at trial upon the offer of any party, if the court conducts a review of the arbitration decision and any other relevant information submitted by the parties and concludes that:

(1) The findings of fact by the arbitration board were not clearly erroneous;

(2) The decision is in accordance with applicable law;

(3) The procedures required for conducting the hearing and rendering the decision were followed fairly and properly without prejudice to either party.

(D) Any party who has not made the offer stated in division (C) of this section may subpoena any member or members of the arbitration board for purposes of cross-examination.

(E) Nothing in this section shall be construed to limit the right of any person to enter into an agreement to arbitrate a controversy underlying a medical claim or to be bound by the decision of the arbitrators.

Supreme Court, U.S.
FILED
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No. 85-1715

In the Supreme Court of the United States

October Term, 1985

THE CITY HOSPITAL OF BELLAIRE,
Petitioner,

vs.

NANCY DELGUZZO, EXECUTRIX, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN G. LANCIONE, *Counsel of Record*
SPANGENBERG, SHIBLEY, TRACI
& LANCIONE
1500 National City Bank Building
Cleveland, Ohio 44114
(216) 696-3232
Counsel for Respondent, Nancy DelGuzzo, Executrix, etc.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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ON PETITION FOR WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF FACTS

Petitioner contends that it lost its right to jury trial by reason of a few days excusable delay in filing a notice of appeal. In fact, there was a five month inexcusable delay in attempting to appeal the critical and controlling judgment which originally imposed liability on the Petitioner. The record in this case discloses two separate

final judgments. The first, the only liability judgment was never appealed.

Ohio has a special procedure for medical malpractice cases whereby, after suit is filed, the case must be submitted to a court-appointed arbitration panel. After the award is filed, each party has an absolute right to reject the award and demand a regular jury trial. In the absence of proper rejection any party can move the court to convert the award into an enforceable trial court judgment. That judgment can be appealed in the usual way if error has occurred in the procedures for reducing the award to judgment. O.R.C. 2711.21 (App. 78a).

In the instant case an arbitration award was made in Respondent's favor on August 3, 1984. Petitioner then moved the trial court simply to modify the award by deducting an offset. Respondent moved to confirm the entire award. The trial court heard both motions on February 5, 1985, studied the briefs and rendered a decision in March. The judge filed his Judgment Journal Entry, which confirmed the award and rendered judgment against Petitioner, on March 22, 1985.

The Petitioner then had 30 days in which to file an appeal under Ohio's Appellate Procedure Rule 4(A) (App. 72). Within that 30 day period Petitioner made no attempt to appeal, but instead elected on April 18, 1985 to file a Motion to Vacate the judgment under the court's "inherent common law power" or, alternatively, under Ohio's Civil Procedure Rule 60(B). This rule (not printed in the Appendix but appended to this Respondent's Answer brief) explicitly states that a Rule 60(B) motion "does not affect the finality of a judgment or suspend its operation." The rule is in full accord with Appellate Rule 4(A) (App. 72a) which specifies the few types of motions

which will suspend the running of the time limit for appeals. A motion under Rule 60(B) R.C.P. is not included in the list of procedures which will stay the time limit.

Petitioner also filed on April 1, 1985 a motion to amend pleadings and to fix a trial date, and included a notice that Petitioner then rejected "the arbitrators' award" (App. 55a). At that time the arbitration award had already been merged into the final judgment. The notice of rejection of award has no resemblance to a notice of appeal, and Petitioner makes no such claim. The motion to amend pleadings and fix a trial date is not one of the specified types of motion which will stay the running of the time limit for appeal.

No further action occurred until August 12, 1985, when the trial court, after due consideration of both parties' briefs, overruled the Motion to Vacate and the Motion to Amend Pleadings and set a Trial Date (App. 7a).

This journal entry in August is the only final judgment which Petitioner has attempted to appeal, and is the only judgment entry involved in the pending Petition for Writ of Certiorari. This second judgment imposed no liability upon Petitioner. It merely let stand the original liability judgment of March 22, 1985 which had long since became final and appeal-proof. Petitioner has never stated any excuse for its election to move to vacate the original judgment instead of appealing it in the usual manner.

Contrary to Petitioner's statement on page 2 of his brief that the Trial Court's Judgment of April 12, 1985, denied him his right to a trial by jury, he had failed to demand his trial by jury after the arbitration but before final judgment of March 22, 1985.

REASONS FOR DENYING THE WRIT

I. A PARTY IS NOT DEPRIVED RECOURSE TO THE COURTS IN VIOLATION OF CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION WHERE HE VOLUNTARILY ELECTS NOT TO APPEAL A STATE TRIAL COURT FINAL JUDGMENT AWARDING DAMAGES BASED UPON A MEDICAL MALPRACTICE ARBITRATION AWARD.

The Ohio Supreme Court did not decide any federal question. It simply declined to review an Ohio Court of Appeals decision that restated the Ohio rule that timely filing of a notice of appeal is jurisdictional. The filing requirement is not satisfied by the mere act of mailing without actual delivery. The burden is cast upon the appellant to follow up after mailing to verify that the Clerk received the mail. When Petitioner mailed the notice 12 days before the time limit but failed to make any effort to verify delivery, even after he did not receive his requested time-stamped copy, he assumed the risk of nonfiling.

Petitioner claims a denial of a constitutional right to jury trial. The fact is that Petitioner had an absolute right to trial by jury by rejecting the arbitration award before it was reduced to judgment. Petitioner failed to reject the award and failed to appeal the original final judgment based on the award. The appeal involved in the instant case is based upon rulings on post-judgment motions. Those motions were not a substitute for appeal, did not enlarge the time for appeal, and left intact the original liability judgment. The pending petition for writ of certiorari will not reach back to review the original

liability judgment, with the result that the jury trial issue has long since become moot.

The record is clear that Petitioner failed to appeal the original liability judgment of March 22, 1985. Petitioner elected to pursue instead post-judgment motions under Civil Rule 60(B) which did not affect the finality of the judgment or extend the time for appeal. When the trial court overruled those motions, Petitioner pursued a frail hope that an Appellate Court might find an abuse of discretion in the Trial Court's rulings on those motions.

Petitioner's counsel at that time had offices in Steubenville, 35 miles from the Belmont County Courthouse in St. Clairsville. He mailed a letter to the Clerk of Courts containing a proper notice of appeal with extra copies, and requested the Clerk to time-stamp a copy and mail it back in an enclosed return envelope to verify filing. Counsel posted the letter on August 30, which was twelve days before the time limit for appeal expired on September 11, 1985. During that critical twelve days, counsel did not receive the mail return of the requested time-stamped copy. The day of August 30 fell on a Friday in 1985. In normal course, the mail should have reached the Clerk on Monday, September 2. Counsel should have received the returned stamped copy in normal course no later than Monday, September 9. A simple telephone call to the Clerk on that day, or the next, or the final day would have disclosed the miscarriage of the mail attempt in time for counsel to make the essential actual filing. A short 35 mile automobile trip is not much of a burden to preserve the right of appeal in a state which has always held that jurisdiction of the Appellate Court does not attach until actual filing of the mandatory notice.

Ohio's practice in this respect differs from the federal practice. Ohio's Appellate Rule 4 contains no section comparable to F.R. App. P. 4 (5), which provides that the District Court may extend the time limit upon motion filed within 30 days after the expiration of the original time limit. Even so, federal practice requires a showing of "excusable neglect or good cause." It is doubtful that even under federal practice an unexplained neglect for 12 days to monitor the requested return mail would be deemed "excusable." The fact that Ohio has not embraced the doctrine of excusable neglect or the concept of mailbox filing may make Ohio's practice old-fashioned, but hardly unconstitutional.

Petitioner makes a second point, contending that counsel mailed within the 30 day rule a Request for Transcript, which was received by the Clerk's office and filed on September 6, within the time limit of September 11, 1985. Petitioner argues that "the request for transcript put both the Court and the opposing party on notice." (Brief at 19). The Request itself (App. 45a) is directed to "Court Reporter Alice Reilly" and asks her to transcribe the proceedings before Judge Knapp "on February 5, 1985." This is certainly not in the form required by Ohio App. R. 3(C) (App. 73a), which requires designation of the judgment or order appealed from. The proceedings before Judge Knapp on February 5, 1985 were the oral arguments and testimony which produced the original judgment of March 22, 1985. (See Opinion of Judge Knapp dated March 20 at App. 13a.) If this Request to the Court Reporter should be deemed a notice that an appeal was pending or intended, it necessarily implied an appeal from the judgment of March 22, 1985, which had resulted from the February 5th hearing.

Ohio law has long held that:

> "Compliance with the requirements as to the filing of the notice of appeal—the time filing, the place of filing, and the content of the notice as specified in the statute—are all conditions precedent to jurisdiction." *Zier v. Board of Unemployment Compensation* (1949), 151 Ohio St. 123, 127 (cited by Petitioner, Brief 18 n.2).

In *Zier,* the appeal was dismissed because the notice did not specify the final judgment or order appealed from.

Ohio practice is liberal in allowing amendment, when the content of the notice is technically inadequate. Where a notice specifies that the order appealed from is the overruling of a motion for new trial or motion for judgment n.o.v., the Courts will allow amendment to appeal the final judgment underlying the motions. If Petitioner's counsel really believed that the Request for Transcript was an adequate substitute notice of appeal, petitioner had an available remedy to amend under Ohio App. R. 3(E). That rule provides that "The Court of Appeals within its discretion and upon such terms as are just may allow the amendment of a timely filed notice of appeal." Petitioner ignored this procedure, and instead simply filed a new notice of appeal, mailed again on September 26 and this time received and filed on September 30, 1985, nineteen days past rule. The appeal then reposed in the Court of Appeals until October 23, 1985 with no effort by Petitioner to convert the Request for Transcript into a Notice of Appeal by amendment. The obvious reason for the failure to amend is that the amendment would convert the Request for Transcript into an appeal from the judgment of March 22, 1985, which resulted from the hearing on Feb uary 5, 1985. The appeal time limit on that judg-

ment had long since passed. An amendment of the Request for Transcript, to make it an appeal from that judgment, would have been futile.

There is no constitutional due process question in the fact that the Appellate Court did not, on its own motion, interpret the Request for Transcript as an adequate notice of appeal from second judgment entry of August 12, 1985, which overruled the motions attacking the first judgment.

II. THE DECISION BELOW IS NOT A DEPARTURE FROM STANDARDS USUALLY FOLLOWED BY OHIO IN THE INTERPRETATION OF ITS APPELLATE RULES; AND IT DOES NOT EFFECTIVELY DENY THE RIGHTS OF PETITIONER TO HAVE HIS CASE HEARD ON THE MERITS NOR DEPRIVE HIM OF HIS RIGHTS TO TRIAL BY JURY.

A. Where The Appellant Timely Mails A Notice Of Appeal To The Clerk Of Courts By Ordinary Mail And Requests A Filed Stamped Copy To Be Returned, And The Clerk Does Not Receive The Notice And Does Not Return A Filed Stamped Copy, There Cannot Be A Presumption That The Clerk Received The Notice Of Appeal Within The 30 Day Time Period.

It is without question that Appellate Rule 4(A) requires actual delivery of the notice of appeal to the Clerk of Courts and the timely filing of such notice in order to effectively pursue an appeal. *Fulton v. State, ex rel. G.M. Corp.* (1936), 130 Ohio St. 494. Timely filing of a notice of appeal is the only jurisdictional requirement,

Loos v. W. & L. E. Ry. Co. (1938), 134 Ohio St. 321; *Ross v. Harden* (1982), 8 Ohio App. 3d 34.

In *Bosco v. City of Euclid* (1974), 38 Ohio App. 2d 40, the Court held that the timely filing of a notice of appeal is jurisdictional and without it the Court cannot act. In *Bosco* the Court refused to permit the appellant to file an appeal of an order denying a motion to vacate a judgment when he had failed to appeal the judgment within 30 days. The court concluded at p. 44:

> "The appellants' objective is obvious. The only pertinent factual basis set out in the affidavit to support the motion to vacate is a claimed failure of notice of the date of judgment until after the thirty day appeal period had expired. A determination of that justification was foreclosed when the first appeal was dismissed for untimely filing of the notice of appeal. Given these facts it would violate the purpose of Civ. R. 60(B)(1) and (5) to allow it to substitute for appeal or be used to circumvent the policy of App. R. 4(A) establishing an appeal period of thirty days. There was no factual issue requiring a hearing. The denial of the motion to vacate was not contrary to law. 'There must be an end to litigation some day,. . . .' *Ackermann v. United States* (1950), 340 U.S. 193, 198, 95 L. Ed. 207, 211."

See also, In Re: Estate of Whitman (1983), 13 Ohio App. 3d 170 and *Price v. Jones* (1983), 9 Ohio App. 3d 64.

This is exactly what we have here where the defendant missed the 30 day statutory requirement for filing his appeal and now seeks to extend that period. There is no basis for that procedure to be followed. There is no evidence that the notice of appeal was received by

the clerk or that the clerk failed to journalize it upon the docket.

In *Young v. Bd. of Review* (1967), 9 Ohio App. 2d 25, the evidence indicated that the clerk had received the notice of appeal and had misplaced it; thus, the notice had been received by him within 30 days but not acted upon. There is no evidence here that the clerk received the notice within 30 days of the order, only that it was placed in the mail within 30 days. There is no provision for filing a notice of appeal by mail. Here, there is no returned receipt by the clerk and no stamped copy by the clerk. In fact, the defendant was on notice that the appeal had not been filed because they requested a stamped copy be returned to them and it never was. They should have at least called the clerk's office and asked why they had not received the stamped copy of the notice of appeal before the 30 days expired.

In *King v. Paylor* (1942), 69 Ohio App. 193, the Court stated at p. 194 in a headnote:

> "2. Leaving a notice of appeal in the office of the clerk of courts without his knowledge is not a filing as of that time within the meaning of Section 12223-4, General Code, governing the time in which a notice of appeal may be filed and does not become a filing until it is brought to the attention of the clerk and he takes custody of it as clerk."

Here the clerk cannot be charged with the receipt and filing of a document of which he had no knowledge.

The Appellate Court was without jurisdiction to hear an appeal as set forth in this case.

The Appellant relies on the case of *Dudukovich v. Housing Authority* (1979), 58 Ohio St. 202 in support of his position. That case is easily distinguishable from this, in that the notice of appeal was required to be filed within 10 days with the Clerk of the Common Pleas Court and with the Housing authority. The notice of appeal was filed in time and a certified mail copy was sent to the Housing Authority within 5 days; and there was evidence in the record that the notice was actually received. Here, of course, there was no certified mail and no evidence of receipt by the Clerk.

B. Where A Notice Of Appeal Is Not Timely Filed Within The 30 Day Period Prescribed By App. R. 4(A), A "Request For Transcript" Of Proceedings Of A Hearing On A Motion, Resulting In A Judgment That Is Not The Subject Of The Appeal, Cannot Be Treated As A Notice Of Appeal.

Appellant argues that his filing of a request for a transcript within the 30 day appeal time should constitute a properly and timely filed notice of appeal.

It should be noted that the instant appeal deals with a ruling by the Trial Court on a Motion to Vacate and a Motion to Amend Pleadings of August 12, 1985; the request for a transcript refers only to proceedings before Judge Knapp on February 5, 1985. There is no way that the request for a transcript can be said to contain information that is reasonably calculated to advise anyone of the ruling that is sought to be appealed, especially since the rulings made on March 20 and 22, 1985 were the ones that were based on the February 5, 1985 hearing.

Appellant suggests that the *Dudukovich* case, *supra*, supports his position that his request for transcript satisfies the requirements for a notice of appeal. The case stands for no such thing, since it deals with the mailing of a copy of notice to a housing authority where the evidence shows that the notice to the court was in fact received. In *Roseman v. Reminderville* (1984), 14 Ohio App. 3d 124, the appellant provided a signed certified mail return receipt showing service of the notice of appeal on the village clerk.

Likewise in *Richards v. Industrial Commission* (1955), 163 Ohio St. 439 and *Capital Loan & Savings Co. v. Biery* (1938), 134 Ohio St. 333, the Supreme Court dealt with cases where *timely* notice of appeal was accomplished and either an amendment was allowed or notice of appeal was incorporated into a journal entry.

In *Commonwealth Oil Co. v. Turk* (1928), 118 Ohio St. 273 at 275, the Court stated that the sole issue to be determined was whether an appeal may be perfected from the Municipal Court to the Court of Appeals. Once again, in *Castleberry v. Evatt* (1946), 147 Ohio St. 30, the Supreme Court dealt with a case where there had been a *timely* notice of appeal filed. The same was true in *In Re: Guardianship of Wisner* (1947), 148 Ohio St. 31; and in *McDowell v. Hannefeld* (1950), 87 Ohio App. 407; and *Moore v. Foreacher* (1951), 91 Ohio App. 28. Likewise in *Maritime v. Marina* (1982), 70 Ohio St. 2d 257, the Court dealt not with a case like we have here but solely with the issue of the interpretation of App. Rule 3(C) which requires the notice of appeal to designate the order appealed from. The appellant stretches much further to his conclusion because here there was *never* a *timely* notice of appeal filed.

The appellant thus has not only failed to have filed a timely notice of appeal of the judgment of March 22, 1985, which has never been denied, but failed to file a timely notice of appeal of the judgment of August 12, 1985. The mere filing of a request for a transcript of proceedings of February 5, 1985, which was not the proceedings on the judgment which they were trying to appeal, cannot possibly be held to designate an appeal from an order of August 12, 1985.

C. Since The Appellant Failed To File A Notice Of Appeal Within The 30 Day Period Required By App. R. 4(A) The Dismissal Of The Appeal Does Not Deny Him Due Process, Even Though The Appellee Received A Copy Of The Said Notice, And Request For Preparation Of Transcript.

Appellant claims that his constitutional right of due process was violated because he has been denied a trial on the merits in this case. This is yet another misrepresentation of the true issue before this Court. To reiterate succinctly, the instant attempt to rest jurisdiction in the Court of Appeals deals with the Trial Court's overruling on August 12, 1985, the appellant's Civ. R. 60(B) Motion to Vacate and Motion to Amend Pleadings (the later motion completely moot since final judgment was rendered March 22, 1985). Assuming, *arguendo*, that an appeal was properly pursued, it would never get to the merits of the Court's March 22, 1985 decision and final judgment, because there was never an appeal attempted or pursued. The appellant made a conscious decision not to appeal the final judgment of March 22, 1985 and later for some unknown reason filed a motion to vacate and to amend pleadings. The courts have continuously refused to allow a

litigant to do by indirection what he cannot do directly. It is well stated in *Bosco v. City, supra* at 43:

> "The purpose of a strict rule is a salutary one. It requires litigants to be alert to insure an orderly and prompt processing of appeals. Under statutes predecessor to Civ. R. 60(B), the courts of this State have strictly enforced the policy of refusing to allow the amendment of final orders for the sole purpose of renewing the appeal period to rescue a litigant from his own lethargy or lack of vigilance in filing a timely notice of appeal:
>
> "'. . . The appellant seeks to do by indirection that which he cannot do directly. The time to appeal the judgment declaring that Raveca Marginean is not the widow and surviving spouse of the deceased has long since passed. Raveca Marginean now wants to again claim that she is the surviving spouse by a motion to vacate all proceedings taken in the probate of the will and matters arising therein. This she cannot do.' *In re: Estate of Marginean* (1961), 87 Ohio L. Abs. 314, 317.
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> * * *
>
> "The motion to vacate in the present case is no different in generic objective from the Motions in *Marginean* and in *Demers*. The issue it raises responds to the rules established in those cases. A reversal of the order of the Court below will achieve nothing but a hearing on the question of vacation of a judgment which the circumstances would make it an abuse of discretion to grant. For it is apparent that were appellants' facts proven true on hearing, the principal consequence would be a fresh denial and a

> new period of thirty days within which to file a notice of appeal from that denial. The review of the substantive determination thus sought was appropriate in the first appeal but was forfeited by delay."

See also Bond & Assoc. v. Dev. Corp. (1978), 54 Ohio St. 2d 363.

There being no denial of a substantial right, there can be no denial of due process. The only issue here is whether or not the appellant's attempted, but failed, filing of his notice of appeal after the 30 day period, can somehow be considered to have been timely filed. The prior cases cited and discussed seem to indicate that under circumstances where the notice was never received by the Clerk as we have here, the Courts have uniformly upheld a dismissal by the Appellate Court for lack of jurisdiction.

Petitioner's reliance upon *Brooks v. Rollins* (1984), 9 Ohio St. 3d 8 to rescue his lost claim of constitutional due process is unfounded. In *Brooks* the Trial Court granted a motion to quash service by publication; on appeal, the Court reversed and ordered the case to proceed on a granted default judgment. The Supreme Court affirmed holding that the original service by publication could be supported by reasonable diligence on the part of plaintiff rather than requiring actual concealment by the defendant. In that case the defendant indeed did not get his day in Court, but instead a default judgment was granted. Indeed, here the appellant has had a full and complete hearing in accordance with O.R.C. 2711.21 and has had every opportunity to *timely* attack the judgment based upon the arbitration award but has failed to do it. The appellant's constitutional argument must fail.

CONCLUSION

Petitioner claims that he is bound by a judgment that is based upon a procedure that was "without trial or hearing whatsoever"; "depriving it of any defense" (pet. 10); "without an opportunity to be heard"; "deprived of recourse to the courts"; "denied the right to defend" (pet. 11). Although appealing to the ear of fair-minded persons, these claims are entirely without foundation.

As the record reveals, the Petitioner did indeed have his day in Court in accordance with the Ohio procedures in a Medical Malpractice case which provide for an arbitration to be held before 3 arbitrators. The hearing was held and both parties were afforded full and complete opportunity to present their claims and defenses. An arbitration award was made in favor of the Respondent and against the Petitioner (App. 16). Indeed, there was a dissenting opinion filed in favor of Petitioner, so his defense was persuasive to someone (App. 25). Petitioner had a right to reject the arbitration award and demand a jury trial; he *voluntarily elected*, rather, to move to modify the award. Final judgment was rendered on the arbitration award and at that point Respondent had 30 days to appeal that final judgment and test the entire proceedings. He *voluntarily elected* not to appeal. That critical decision was not imposed upon him by anyone, it was his voluntary action. He cannot now claim he was deprived of a constitutionally guaranteed right of access to the courts because he elected to waive the trial by jury and move to modify the arbitration award.

Due Process and Equal Protection guarantees of the Constitution cannot be a springboard to try to recapture rights voluntarily and freely given up. Petitioner's own

actions decided exactly how he was to proceed in this case, and he has not been deprived of any constitutionally guaranteed rights. The Petition should fail.

Respectfully submitted,

JOHN G. LANCIONE, *Counsel of Record*
SPANGENBERG, SHIBLEY, TRACI
& LANCIONE
1500 National City Bank Building
Cleveland, Ohio 44114
(216) 696-3232
Counsel for Respondent, Nancy DelGuzzo, Executrix, etc.